MAY 1 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 77-6673

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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THE STATE OF TEXAS

v.

ZACKARY C. BROWN

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Appeal from the County Court at Law Number Two
El Paso County, Texas

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# JURISDICTIONAL STATEMENT

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RAYMOND C. CABALLERO
Attorney for Appellant Brown

Pearson & Caballero
1610 State National Plaza
El Paso, Texas 79901
(915) 544-2114

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. _____

THE STATE OF TEXAS

v.

ZACKARY C. BROWN

Appeal from the County Court at Law Number Two
El Paso County, Texas

## JURISDICTIONAL STATEMENT

This is a direct appeal from the judgment of the County Court at Law Number Two for El Paso County, Texas, finding Appellant guilty of the violation of failing to identify himself.

### A. Reports

The Court below wrote no opinion.

### B. Jurisdiction

1. Appellant was charged with violating Section 38.02 of the Texas Penal Code in that he allegedly refused to give a report of his name and residence address to a peace officer who had lawfully stopped him and requested the information. Appellant was fined the sum of $45.00.

2. The judgment of the County Court at Law Number Two was entered on February 1, 1978. A Notice of Appeal was filed with that Court on February 14, 1978.

3. This Court has jurisdiction by virtue of Section 1257(2), Title 28, United States Code, which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court ... [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The judgment of the County Court at Law in this case is a decree rendered "by the highest court of a State in which a decision could be had," because pursuant to Article 4.03 of the Texas Code of Criminal Procedure, no appeal may be had to the Texas Court of Criminal Appeals where the fine imposed did not exceed $100.00. Article 4.03 provides as follows:

> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars.

4. The Texas Court of Criminal Appeals has previously held that where one is fined less than $100.00 in a County Court at Law, there is no appeal to the Texas Court of Criminal Appeals. Coates v. State of Texas, 308 S.W.2d 869 (Tex. Ct. Crim. App. 1957). See also, Williams v. Florida, 399 U.S. 78 (1970).

5. In this appeal, Appellant questions the constitutionality of Section 38.02(a) of the Texas Penal Code, which provides as follows:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

## C. Questions Presented

QUESTION I. Section 38.02 of the Texas Penal Code is vague and ambiguous on its face and therefore violates the First Amendment because it unreasonably infringes on the right of a form of expression--that is, silence--and it also violates the due process clause of the Fifth and Fourteenth Amendments because it is vague and overbroad on its face.

QUESTION II. Section 38.02 of the Texas Penal Code is an unwarranted invasion of the right of privacy and therefore violates the Fourth Amendment.

QUESTION III. Section 38.02 of the Texas Penal Code punishes silence and is therefore a violation of the right to remain silent granted by the self-incrimination clause of the Fifth Amendment.

## D. Statement of the Case

Shortly after noon on December 9, 1977, El Paso Police Patrolman Venegas and his partner were driving on Magoffin Street in the City of El Paso. They were patrolling the area and saw Appellant, ZACKARY BROWN, walking down an alley. Another person was seen walking in the alley, but the officers could not state that Appellant and the other pedestrian had met or had talked to each other.

The officers drove into the alley, stopped Appellant, and asked him his name and what he was doing in the alley. Appellant refused to give his name. Appellant was arrested. The officer noted that Appellant is a black male in his mid-twenties and that he stopped Appellant because he had not seen him in the area before. The officer admitted that many blacks are found in that area of town. The officer stated that he suspected no crime and just wanted to stop and ask Appellant



his name. Appellant was patted down and was taken to the jail for booking. No contraband or weapons were discovered in any search.

On the way to jail Appellant did tell the officers his name, but he was still booked. The officer noted that the violation was already complete.

Appellant was charged with the Class C misdemeanor, Section 38.02 charge. Prior to trial, Appellant moved in writing to dismiss the charges because Section 38.02 is unconstitutional as violative of

> ... Fifth and Fourteenth Amendment due process clauses, because it is vague and overbroad, and can punish innocent acts, because it invades the Fourth Amendment right of privacy, because it is possible under the statute to punish one's First Amendment right of silence as a form of expression, and also the right under the Fifth Amendment to remain silent.

The motion to set aside the charges was denied by the County Court at Law just before trial. Appellant excepted to the Court's ruling and bases this appeal on that ruling.

## E. Substantial Federal Question

Appellant urges this Court to note probable jurisdiction in this case because of the substantial federal questions raised here.

In Terminiello v. Chicago, 337 U.S. 1, 4 (1949), this Court stated as follows:

> Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.

See also, Cox v. State of Louisiana, 379 U.S. 536 (1965).

If this Court has stricken down "public order" statutes because they might be used to punish provocative verbal acts,

then it should follow that statutes which punish non-provocative silence must also be invalid. Norwell v. Cincinnati, 414 U.S. 14 (1973).

In cases involving First Amendment rights, this Court has traditionally looked much closer at any statute potentially infringing on such protected activities. Those laws possibly punishing First Amendment protected speech or expression must be "narrowly drawn to prevent the supposed evil." Cantwell v. Connecticut, 310 U.S. 296 (1940); Aston v. Kentucky, 384 U.S. 195 (1966); and Keyishian v. Board of Regents of U. of St. of N.Y., 385 U.S. 589 (1967).

Silence, like other non-verbal acts or expressions, is constitutionally protected. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969). Moreover, silence, even total silence, is a specifically protected activity by the self-incrimination clause of the Fifth Amendment to the United States Constitution. See also, Women Strike for Peace v. Hickel, 420 F.2d 597 (D.C. Cir. 1969).

The Fourth Amendment provides that our right "to be secure in [our] persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated...." (Emphasis added). It is respectfully submitted to this Court that these Fourth Amendment benefits are not secure if one can be punished, as Appellant here was, for refusing to give his name or address when there was no probable cause to believe that he committed a crime and, indeed, there was no suspicion that he committed a crime.

The overly broad language of the statute provides a weapon to those who would abuse it to punish persons who bothered no one but chose to remain silent. It could also, conceivably, allow police to punish those who did not furnish identification satisfactory to the police.



To allow the use of Section 38.02 would be to condone something much greater than a subtle erosion of our constitutional rights.

The three questions raised here are substantial constitutional questions and require review by this Court by way of full hearing, briefs, and argument. Perhaps some members of this Court might find the arrest of Appellant a minor matter. But Section 38.02 allows the police to arrest and jail those persons who have committed no crime and no breach of peace, nor indeed has there been any obstruction of the machinery of justice. Unfortunately for many, once the arrest is made the damage is done, and perhaps many of the charges are dismissed inasmuch as there appears no point in prosecuting further. The fact that prosecution was continued here provides an opportunity for review of a statute which has not been reviewed before, even by a Texas appellate court.

## Prayer

For all the foregoing reasons, Appellant urges this Court to note probable jurisdiction and to set this case down for full hearing, briefs, and arguments on the merits. The questions raised are simply too important to ignore.

Respectfully submitted,

PEARSON & CABALLERO
1610 State National Plaza
El Paso, Texas 79901
(915) 544-2114

By: Raymond C. Caballero
RAYMOND C. CABALLERO
Attorney for Appellant

IN THE COUNTY COURT AT LAW NUMBER TWO

EL PASO COUNTY, TEXAS

| | | |
|---|---|---|
| THE STATE OF TEXAS,<br>Plaintiff,<br><br>vs.<br>ZACKARY C. BROWN,<br>Defendant, | ) | NO. 90916 |

FIRST AMENDED NOTICE OF APPEAL

TO THE HONORABLE COUNTY COURT AT LAW NUMBER TWO:

ZACKARY C. BROWN, Defendant above, hereby gives notice to this Court of his intention to appeal the Judgment of Conviction entered on February 1st, 1978. A final Judgment having been rendered by the highest Court of this State in which a decision could be had, an Appeal to the Supreme Court of the United States is sought pursuant to Title 28, U.S.C.A. Section 1257 (2).

Respectfully submitted,

PEARSON & CABALLERO
Attorneys for Defendant
1610 State National Plaza
El Paso, Texas 79901

By: Ree
RAYMOND C. CABALLERO

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing notice of First Amended Notice of Appeal was delivered to the Office of the County Attorney, City-County Building, El Paso, Texas 79901, on this 14 day of February, 1978.

Ree
RAYMOND C. CABALLERO

Supreme Court, U. S.
FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

# APPENDIX

## In the Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-6673**

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ZACKARY C. BROWN,
*Appellant,*

—*v.*—

TEXAS

---

ON APPEAL FROM THE COUNTY COURT AT LAW
NUMBER TWO, EL PASO COUNTY, TEXAS

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**JURISDICTIONAL STATEMENT FILED MAY 1, 1978**
**PROBABLE JURISDICTION NOTED OCTOBER 16, 1978**

# In the Supreme Court of the United States

OCTOBER TERM, 1978

**No. 77-6673**

---

ZACKARY C. BROWN,

*Appellant,*

—*v.*—

TEXAS

---

ON APPEAL FROM THE COUNTY COURT AT LAW
NUMBER TWO, EL PASO COUNTY, TEXAS

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## RELEVANT DOCKET ENTRIES

In the Municipal Court of the City of El Paso No. 3, El Paso County, Texas:

Complaint filed December 10, 1977.

Appeal Bond filed December 20, 1977.

In the County Court at Law Number Two, El Paso County, Texas:

Motion to Set Aside Information filed February 1, 1978.

Judgment filed February 1, 1978.

Commitment filed February 1, 1978.

Notice of Appeal filed February 3, 1978.

First Amended Notice of Appeal filed February 14, 1978.

FAILURE TO IDENTIFY

IN THE MUNICIPAL COURT OF THE CITY
EL PASO NO. 3
El Paso County, Texas

No. 580

THE STATE OF TEXAS )
)
CITY AND COUNTY OF EL PASO )

COMPLAINT—Filed December 10, 1977

IN THE NAME AND BY AUTHORITY OF
THE STATE OF TEXAS:

I, Enrique Venegas, do solemnly swear that I have reason to believe and do believe that, in the City of El Paso, Texas, and County of El Paso, Texas, on or about the 9 day of December, 1977, and anterior to making and filing this complaint, Zachary Brown, did then and there intentionally refuse to report his name and residence address to a peace officer, to-wit: A. Sotelo & E. Venegas, who had lawfully stopped the said Zachary Brown, and requested the information;

Against the peace and dignity of the State.

/s/ [Illegible]
Affiant

[Jurat (omitted in printing)]



THE STATE OF TEXAS
COUNTY OF EL PASO
CITY OF EL PASO

TRANSCRIPT OF APPEAL—December 10, 1977

At a session of the Municipal Court of the City of El Paso No. 3 for the City of El Paso in said county held before Glen Sutherland, Judge for said city in said city on the 10 day of Dec., A.D. 1977 the following criminal action was tried, to-wit: The State of Texas vs. Zachary C. Brown, No. 580.

And the following are the proceedings had in said criminal action before said court, to-wit: On Dec. 10, 1977, at the time set by the court to be heard the described cause. The defendant and defendant's attorney appeared and announced ready for trial. A plea of Not Guilty was entered to the offense charged in the complaint on file in this case. After having heard and considered the evidence and argument, this court finds and adjudges defendant guilty of the offense charged in the complaint on file in this cause and accordingly assesses a fine of 20.00 and court costs of 2.50. It is therefore ordered and adjudged by this court that the State of Texas for the use and benefit of the City of El Paso, Texas, do have and recover of defendant the sum of the fine and court costs assessed and it is further ordered and adjudged by the court that defendant be committed to and remain in the custody of the Chief of Police of the City of El Paso, Texas, until such fine is paid. Let execution issue to collect such fine. Let capias issue.

/s/ Glen Sutherland
Judge of the Municipal Court
of the City of El Paso No. 3

On Dec. 10, 1977, the said defendant gave notice in open court to Judge Glen Sutherland of his appeal to County Court at Law No. 2 of El Paso County, Texas.

/s/ Glen Sutherland
Judge of the Municipal Court
of the City of El Paso No. 3

The State of Texas
County of El Paso
City of El Paso

I, Herman Tafoya, Clerk of the Municipal Court of the City of El Paso No. 3 in said county, do certify that the foregoing is a complete and correct transcript of all the proceedings had before said court in the said cause of The State of Texas v. Zachary C. Brown No. 580.

Witness my signature on this 20 day of Jan., A.D. 1978.

/s/ Herman Tafoya
Clerk of the Municipal Court
of the City of El Paso No. 3

By /s/ [Illegible]
Deputy Court Clerk



IN THE COUNTY COURT AT LAW NUMBER TWO
EL PASO COUNTY, TEXAS

No. 90916

THE STATE OF TEXAS, PLAINTIFF

*vs.*

ZACKARY C. BROWN, DEFENDANT

MOTION TO SET ASIDE INFORMATION—
Filed February 1, 1978

TO THE HONORABLE COUNTY COURT AT LAW NUMBER TWO:

ZACKARY C. BROWN, Defendant above, moves this Court to dismiss all charges against him for failure or refusal to identify himself for the following reasons:

I.

The statute under which the Defendant is being prosecuted, Section 38.02 of the Texas Penal Code, is unconstitutional under the United States Constitution because it violates the Fifth and Fourteenth Amendment due process clauses, because it is vague and overbroad, and can punish innocent acts, because it invades the Fourth Amendment right of privacy, because it is possible under the statute to punish one's First Amendment right of silence as a form of expression, and also the right under the Fifth Amendment to remain silent.

For all the foregoing reasons, the Defendant respectfully moves this Court to dismiss all charges against him.

Respectfully submitted,

PEARSON & CABALLERO
Attorneys for Defendant
1610 State National Plaza
El Paso, Texas 79901

By /s/ Raymond C. Caballero
RAYMOND C. CABALLERO

IN THE COUNTY COURT AT LAW NO. 2
OF EL PASO COUNTY, TEXAS

No: 90916-2

THE STATE OF TEXAS

*vs.*

ZACKARY BROWN

JUDGMENT—Filed February 1, 1978

On this day this cause was called for trial; and came the State of Texas by and through its Assistant County Attorney, and the Defendant Zackary Brown appeared in person and by attorney, and the parties announced ready for trial. The Defendant thereupon waived a jury and submitted his case to the Court; the Complaint was read to the Defendant and the Defendant pleaded not guilty thereto; and the Court having heard the Complaint read and the Defendant's plea of not guilty thereto, the evidence in the case, the arguments of counsel, and being fully advised in the premises, doth hereby consider, adjudge and decree that the said Defendant is guilty of the offense charged and that the State of Texas recover of the Defendant a fine of $45.00 and all costs of the prosecution, and that the Defendant, if present, be committed to jail until such fine and costs are paid; or if the Defendant be not present, that a capias forthwith issue, commanding the Sheriff to arrest the Defendant and commit him to jail until such fine and costs are paid; also, that execution may issue against the property of such Defendant for the amount of such fine and costs.

COMMITMENT - filed February 1, 1978

## THE STATE OF TEXAS

IN THE County Court At Law #2 OF EL PASO COUNTY

Jan Term, 1978

TO THE SHERIFF OF EL PASO COUNTY—GREETING:

WHEREAS, on the 1st day of Feb, A. D., 1978, a judgment was rendered by the County Court At Law #2 of El Paso County, Texas, in favor of the State of Texas, against Zachary Brown in Cause No. 70916 wherein said Zachary Brown was charged with the offense of Failure to Identify and his punishment assessed at imprisonment in the County Jail of said County for a term of _____ and a fine of $ 45.00 and the further sum of $ 42.00 costs of his prosecution.

These are therefore to authorize and command you to take the body of the said Zachary Brown and commit him to the County Jail of said County there to remain until such judgment is fully paid, or until he is otherwise legally discharged by due course of law.

HEREIN FAIL NOT, and due return make hereof as the law directs.

Given under my hand and seal of said Court, at office in El Paso, Texas, on this the 1st day of Feb, A. D. 1978

(SEAL)

La Donna McConnell County Clerk

By Wilda Rhea Deputy

## BILL OF COSTS

| CLERK'S COSTS | | | Amt. Clerk's costs brought forward | 15. | 75 |
|---|---|---|---|---|---|
| Issuing Capias | | 75 | **SHERIFF'S FEES** | | |
| Entering Appearance | | 15 | Arrest | 3 | 00 |
| Docketing Cause | | 25 | Bond | | |
| Swearing and Empaneling Jury, etc. | | | Summoning Witnesses | | |
| Issuing Subpoenas | | | Mileage | | |
| Swearing Witnesses | | | Jury Fee | | |
| Inserting add'l Names | | | Commitment | 2 | 00 |
| Issuing Attachment | | | Release | 1 | 00 |
| Entering Order | | | County Attorney's Fee | 15 | 00 |
| Filing Papers | | | **COUNTY FEES** | | |
| Judgment | 1 | 00 | | | |
| Entering Continuance | | | Trial | 5 | 00 |
| Entering Motion | | | Jury | | |
| Entering Recognizance | | | Fine COP | 45. | 00 |
| Entering Information | | 10 | | | |
| Commitment | 1 | 00 | | | |
| | | | | | |
| | | | | | |
| Clerk's costs carried forward | | | Total Fine and Costs $ | 87. | 75 |

(SEAL)

A true bill of costs I hereby certify:

La Donna McConnell County Clerk

By Wilda Rhea Deputy

IN THE COUNTY COURT AT LAW NUMBER TWO
EL PASO COUNTY, TEXAS

No. 90916

THE STATE OF TEXAS, PLAINTIFF

*vs.*

ZACKARY C. BROWN, DEFENDANT

ORDER—February 3, 1978

TO THE HONORABLE COUNTY COURT AT LAW NUMBER TWO:

ON THIS 3 day of February, 1978, came on to be considered Defendant ZACKARY C. BROWN's Application For Stay of Execution of Judgment Pending Appeal. The Court, having fully considered said Application and having heard the evidence thereon, is of the opinion that said application should be granted.

IT IS THEREFORE ORDERED that said Application of Defendant for Stay of Execution of Judgment Pending Appeal be, and the same is hereby, granted.

SIGNED on February 3, 1978.

/s/ John L. Fashing
JOHN L. FASHING
Judge

IN THE COUNTY COURT AT LAW NUMBER TWO
EL PASO COUNTY, TEXAS

No. 90916

THE STATE OF TEXAS, PLAINTIFF

*vs.*

ZACKARY C. BROWN, DEFENDANT

NOTICE OF APPEAL—Filed February 3, 1978

TO THE HONORABLE COUNTY COURT AT LAW NUMBER TWO:

ZACKARY C. BROWN, Defendant above, hereby gives notice to this Court of his intention to appeal the Judgment of Conviction entered in this cause.

Respectfully submitted,
PEARSON & CABALLERO
Attorneys for Defendant
1610 State National Plaza
El Paso, Texas 79901

By: /s/ Raymond C. Caballero
RAYMOND C. CABALLERO

[Certificate of Service (Omitted in Printing)]



IN THE COUNTY COURT AT LAW NUMBER TWO
EL PASO COUNTY, TEXAS

No. 90916

THE STATE OF TEXAS, PLAINTIFF

*vs.*

ZACKARY C. BROWN, DEFENDANT

MOTION TO PROCEED IN FORMA PAUPERIS
—Filed February 3, 1978

TO THE HONORABLE COUNTY COURT AT LAW NUMBER TWO:

ZACKARY BROWN, Defendant above, respectfully moves this Court to allow him to proceed in *forma pauperis* for the following reasons:

ZACKARY BROWN is truly in *forma pauperis* in that he has no property or income with which to retain an attorney or to assist him in his appeal.

The Court has heretofore been given an affidavit in *forma pauperis* executed by ZACKARY BROWN under oath.

Respectfully submitted,

PEARSON & CABALLERO
Attorneys for Defendant
1610 State National Plaza
El Paso, Texas 79901

By: /s/ Raymond C. Caballero
RAYMOND C. CABALLERO

[Certificate of Service (Omitted in Printing)]

IN THE COUNTY COURT AT LAW NUMBER TWO
EL PASO COUNTY, TEXAS

No. 90916

THE STATE OF TEXAS, PLAINTIFF

*vs.*

ZACKARY C. BROWN, DEFENDANT

ORDER—Filed February 3, 1978

TO THE HONORABLE COUNTY COURT AT LAW NUMBER TWO:

ON THIS 3 day of February, 1978, came on to be considered Defendant ZACKARY C. BROWN's Motion to proceed in *forma pauperis*. The Court, having fully considered said Motion and having heard the evidence thereon, is of the opinion that said Motion should be granted.

IT IS THEREFORE ORDERED that said Motion of Defendant to proceed in *forma pauperis* be, and the same is hereby, granted.

SIGNED on February 3, 1978.

/s/ John L. Fashing
JOHN L. FASHING
Judge



IN THE COUNTY COURT AT LAW NUMBER TWO
EL PASO COUNTY, TEXAS

No. 90916

THE STATE OF TEXAS, PLAINTIFF

*vs.*

ZACKARY C. BROWN, DEFENDANT

FIRST AMENDED NOTICE OF APPEAL
—Filed February 14, 1978

TO THE HONORABLE COUNTY COURT AT LAW NUMBER TWO:

ZACKARY C. BROWN, Defendant above, hereby gives notice to this Court of his intention to appeal the Judgment of Conviction entered on February 1st, 1978. A final Judgment having been rendered by the highest Court of this State in which a decision could be had, an Appeal to the Supreme Court of the United States is sought pursuant to Title 28, U.S.C.A. Section 1257 (2).

Respectfully submitted,

PEARSON & CABALLERO
Attorneys for Defendant
1610 State National Plaza
El Paso, Texas 79901

By: /s/ Raymond C. Caballero
RAYMOND C. CABALLERO

[Certificate of Service (Omitted in Printing)]

IN THE COUNTY COURT AT LAW NO. 2
EL PASO COUNTY, TEXAS

No. 90916

THE STATE OF TEXAS

*v.*

ZACKARY BROWN

TRANSCRIPT OF TESTIMONY—February 1, 1978

BE IT REMEMBERED, that on this, the 1st day of February, A. D. 1978, the following testimony was introduced before the Honorable John L. Fashing, Judge, County Court at Law No. 2, El Paso County, Texas, in the above styled and numbered cause.

APPEARANCES:

FOR THE STATE:

Mr. Craig Patton, Assistant County Attorney
Room 201 City-County Bldg., El Paso, Texas

FOR THE DEFENDANT:

Mr. Raymond Caballero, 1610 State National Plaza, El Paso, Texas

[2] THE COURT: We're here on the case of the State of Texas v. Zackary Brown on the offense of Failure to Identify under Article 38.02 of the Texas Penal Code, which reads, "A person commits an offense if he intentionally refuses to report, or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information." An offense under that section is a Class C misdemeanor. Now the Defendant has filed a Motion to Dismiss the Information on the grounds that it is unconstitutional



upon its face under the United States Constitution. And we'll hear the arguments or any evidence, if there is any, on that first. Does the State have any response?

MR. PATTON: The State would contend, your honor, that this particular statute is not vague or overbroad, but that it does specify that one only report his name and address upon request by a police officer. It also states as one of the elements of the offense that the individual has to be lawfully stopped, and naturally under this instance, being lawfully stopped, an officer needs some sort of basis from the circumstances involving the stop to draw any circumstances and to have some sort of reasonable inference from these circumstances that perhaps a crime has been committed, or is about to be committed, something of the like. And what the State [3] is contending is that an officer, and reading the Statute, he simply cannot go up to anyone on the street.

THE COURT: Well let's assume it's a lawful stop, whether it's on probable cause or perhaps just a stop and frisk case, you know, under the Constitution, that they permit. Let's assume that that's a lawful stop.

MR. PATTON: What the State's contending is the lawful stop provides a safeguard.

THE COURT: What about after the lawful stop, then where are you at?

MR. PATTON: Okay, well, as I said, the Statute, I think, is specific as to reporting an individual's name and address. The Defendant's counsel contends that the Statute is vague and overbroad.

THE COURT: Yeh, but why is it lawful to, he contends more than that.

MR. PATTON: Yeh, not having researched these other areas, I really can't state right now. I can't argue the other arguments that he proposes.

THE COURT: Well you're a lawyer now and prosecutor both for the [4] State. What do you think about if you stop a person lawfully, and then if he doesn't want to talk to you, you put him in jail for committing a crime.

MR. PATTON: Well first of all, I would question the Defendant's statement in his motion that the First Amendment gives an individual the right to silence.

THE COURT: I'm asking this question, rather than looking, I'm asking you why should the State put you in jail because you don't want to say anything.

MR. PATTON: Well, I think there's certain interests that have to be viewed.

THE COURT: Okay, I'd like you to tell me what those are.

MR. PATTON: Well, the Governmental interest to maintain the safety and security of the society and the citizens to live in the society, and there are certainly strong Governmental interests in that direction and because of that, these interests outweigh the interests of an individual for a certain amount of intrusion upon his personal liberty. I think these Governmental interests outweigh the individual's interests in this respect, as far as simply asking an individual for his name [5] and address under the proper circumstances.

THE COURT: But why should it be a crime to not answer?

MR. PATTON: Again, I can only contend that if an answer is not given, it tends to disrupt.

THE COURT: What does it disrupt?

MR. PATTON: I think it tends to disrupt the goal of this society to maintain security over its citizens to make sure they are secure in their gains and their homes.

THE COURT: How does that secure anybody by forcing them, under penalty of being prosecuted, to giving their name and address, even though they are lawfully stopped?

MR. PATTON: Well I, you know, under the circumstances in which some individuals would be lawfully stopped, it's presumed that perhaps this individual is up to something, and the officer is doing his duty simply to find out the individual's name and address, and to determine what exactly is going on.

THE COURT: I'm not questioning, I'm not asking whether the officer shouldn't ask questions. I'm sure they should ask everything [6] they possibly could find out. What I'm asking is what's the State's interest in putting a man in jail because he doesn't want to answer something. I realize lots of times an officer will give a defendant a Miranda warning which means a defendant doesn't have to make a statement. Lots of defendants go ahead and confess, which is fine if they want to do that. But if they don't confess, you can't put them in jail, can you, for refusing to confess to a crime?



MR. PATTON: I think in a way not identifying oneself tends to thwart the police power. Because, for instance, if an individual has committed a crime and if he refuses to identify himself, that tends to thwart the process.

THE COURT: Doesn't it also tend to thwart the process when you appoint a lawyer to defend him, and the lawyer tells him to take the Fifth Amendment.

MR. PATTON: Well I don't think privilege against self-incrimination would cover giving one's name.

THE COURT: Why is that?

MR. PATTON: I don't think it's included with the privilege against self-incrimination under the Fifth Amendment.

[7] THE COURT: Why not?

MR. PATTON: Well I can't state you a case right off hand.

THE COURT: Well can you state me some logic?

MR. PATTON: Well, simply giving one's name and address does not mean that that person is guilty of any crime. It's certainly not self-incriminating.

THE COURT: Well, isn't it a, would the Fifth Amendment protect a person from having to tell the police, I'm a fugitive.

MR. PATTON: I think under those circumstances saying that one is a fugitive might be self-incriminating, but again, I would not . . .

THE COURT: But it's common knowledge to this Court that when the police stop and ask for a name and address, not all the time but I'm sure quite often, if not most of the time, they'll check on the radio to see if there's an outstanding warrant. And then if there is, the man has to go to jail.

MR. PATTON: I think what underlies the statute is that a policeman cannot, as I said earlier, stop any person walking down the [8] street. He has to have some circumstances, some reasonable inference drawn upon from his experience as a police officer that this individual at this particular time and place might have committed a crime or is about to commit a crime, or some circumstances showing that.

THE COURT: I understand that it's a lawful arrest, you know, I mean a lawful stop. But what about after a lawful stop, why does it become a crime not to give your name and address, other than the statute. Well okay, is there anything else you have. I just thought you could help the Court with some of the reasons. Mr. Caballero.

MR. CABALLERO: Yes, your Honor, just very briefly, I want to make sure that I, the lawful stop, I'm assuming that the State here, through its police officers, had some reason to make an initial stop and ask a question or so. I'm not assuming that they made the stop for the purpose of asking the name. If the purpose of the stop was I want to ask this fellow's name, then of course I would contend that that's not a lawful purpose, if you're just curious about a fellow's name. If the purpose of the stop was some other legitimate reason, and they just wanted to start asking him some questions, of course, I think the State has, they have the right to free speech also, the policeman can say pretty much what he wants to say, and ask whatever [9] he wants to ask.

THE COURT: I hope they do ask lots of questions. Lots of people who have committed crimes, for some reason answer questions that gets them in hot water, which is good, you know.

MR. CABALLERO: What happens is that a person, for whatever reason he has, and it's his own personal reason, it's his right. If he doesn't want to answer those questions, then what happens is that that's the end of it. Unless they have something they can charge him with, other than the Statute here, I'm contending



that's the end of it. If they don't have probable cause to believe some crime, other than refusing to give your name, has been committed or that they're in danger or someone else is in danger, that's the end of it. The State's interest has stopped. The State's interest that the County Attorney's office is talking about here to protect people, their person and place and so forth, I think everyone recognizes that. But I think the evidence is going to show here, and I think the Statute on its face allows police officers and other peace officers to stop a person simply to ask their name, even just to stop them, ask their name, and if they don't answer, they can put them in jail. Now there are cases here in El Paso, I think the County Attorney's office will agree with me, where they ask a name and the fellow says, this is my name and then [10] they say, where's your identification, and then he doesn't have the ID and they stick him in jail for that. Because they figure that an oral identification is not sufficient and they have to exhibit some form of identification. And our contention here Judge, aside from the various Constitutional amendments applicable, and our contention basically is that in this country, in large part, one doesn't have to walk around with papers, like one did in countries with marshall law or Nazi Germany or Soviet Russia or wherever and they'd stop you and say, where are your papers anytime they want to. We've never had that system here. And if a person, for whatever reason he has, decides to remain totally silent and is not being abusive or causing someone any problem, he has the right to remain silent. Now unless they know of something that he did that's the end of it.

THE COURT: Well, what happens if he committed a crime in their presence and they actually arrested him, that's a lawful stop.

MR. CABALLERO: And they charged him with additional failure to identify?

THE COURT: When they ask him and he dosen't want to say anything?

MR. CABALLERO: It's the same thing again, whether you committed no crime or whether you committed a crime and they wanted to [11] stack a charge of failure to identify on top of it, it's all the same, in any instance, whether one has committed a crime or whether one has not committed a crime, one has the right to privacy, to remain silent, not to say anything. Conceivably a person's name could incriminate him. I can see that if a person is driving down the street, and there's something the matter with his car or there's a routine license check, he might want to stop him and see if someone is lawfully driving. The State has an interest to see that persons are licensed to drive and the license, in addition to a license, is a form of identification. That's not what we have here, you don't need a license to walk.

THE COURT: This is a pedestrian case.

MR. CABALLERO: That's what I'm saying, you don't need a license to walk, so I'm distinguishing whatever the State may have to ask for identification at other times. One does not have the right to ask someone because he's walking down an alley, or a street, or whatever, for identification or for a license to walk or whatever they want to stop him for, and that's our contention here Judge.

THE COURT: Okay, well the Court will, I've been studying or looking for some case law on this question. There's one case, Row [12] v. Ingramham, 403 Fed. Sup. 931, 1975. And it shows that probable jurisdiction was noted by the United States Supreme Court, the United States Supreme Recorder 1,100, but I haven't had time to find out what happened in the Supreme Court on that.

MR. CABALLERO: May I ask Judge, what Statute is involved in the Rowe case?

THE COURT: I don't know, it's something to do with having to give the names of persons who receive some type of medical treatment, receive some type of drug prescription from doctors and whether they had to give the names of persons, but I've only perused the case here this morning. I'm going to have to go see what the Supreme Court did. But under headnote 3 it seems



to be getting under that case and it may have something to do possibly with this case about a man has the right to be left alone. I'll consider your motion, including all the grounds set out in this Rowe v. Ingraham case. And then I have the case here of Shelton v. Tucker, United States Supreme Court 364 U.S. 479, 508 2nd 231, and it's also talking about having constitutional rights to privacy, and I'll consider all the grounds alleged in there as being before the Court. However, there's a stronger ground that the Court in Texas has to indulge in, the presumption that all State Statutes are [13] constitutional, unless it's clear that it's unconstitutional. Inasmuch as there appears to be no Texas cases to ever deal with this Statute to my knowledge, and not being able to even find a similar statute in my brief research from any other state or federal cases right on that point, I'll have to find that the Texas statute is constitutional even though I think there's a substantial federal question here, and an Appellate Court, after due consideration, might well hold the Statute unconstitutional upon its face. I can't reach that conclusion with the cases I have available at this time. So is the State ready to proceed on the merits?

MR. PATTON: The State is ready, your Honor.

MR. CABALLERO: The Defendant's ready, your honor.

THE COURT: Now, does the Defendant wish to waive his trial by jury?

MR. CABALLERO: Yes, your honor, I've advised my client of his right to trial by jury and we waive it.

THE COURT: Okay, Mr. Zackary Brown, is that correct? Do you want to waive your right to trial by jury?

MR. BROWN: Yes, your honor.

[14] THE COURT: Does the Defendant waive the reading of the Complaint.

MR. CABALLERO: Your honor, we'd like it read.

THE COURT: I'll consider your motion to set aside the Information, really it'd be a motion to set aside the complaint, cause this is not an Information as this is a

trial de novo from an appeal from City Court, and here is the complaint. The State will read it.

MR. PATTON: The State of Texas, City and County of El Paso, in the name and by the authority of the State of Texas, I, Enrique Venegas do solemnly swear that I have reason to believe and do believe that in the City of El Paso, Texas, and County of El Paso, Texas, on or about the 9th day of December, 1977, and interior to making and filing this complaint, Zackary Brown did then and there intentionally refuse to report his name and residence address to a peace officer, to-wit, A. Sotelo and Enrique Venegas, who had lawfully stopped the said Zackary Brown and requested the information against the peace and dignity of the State. Signed Alfredo Sotelo, Affiant. Subscribed and sworn on the 9th day of December, 1977.

THE COURT: What says the Defendant and how do you plea?

[15] MR. CABALLERO: We plead not guilty to the charge.

THE COURT: Okay, the State may call its first witness.

MR. PATTON: Officer Venegas.

ENRIQUE VENEGAS, JR. having been duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. PATTON:

Q. Okay Officer, would you please state your full name to the Court?
A. Enrique Venegas, Jr.
Q. And how are you employed Officer?
A. I'm a Police Officer for the City of El Paso.
Q. In what capacity are you employed by the City?
A. Patrolman.
Q. And were you so employed in that capacity on or about December 9, 1977?
A. I was.



Q. Now on that date in question, you came into contact with one Zackary Brown, is that correct?
A. That's correct.
Q. And you were driving down Magoffin Street by the 3000 block of Alameda?
[16] A. Yes sir.
Q. And that was at approximately 12:45 P.M. on December 9, 1977?
A. Yes it was.
Q. And on that date and time in question, while you were driving down Magoffin, you had occasion to notice one Zackary Brown, is that correct?
A. That's correct.
Q. Okay, will you please explain to the Court what led you to first notice Zackary Brown?
A. Okay, we were patroling the area and we noticed the subject walking down the alley behind Alameda.
Q. Behind Alameda, and you were driving on Magoffin, is that correct?
A. Right, Magoffin.
Q. And you had a view of the alley from the position of yourself on Magoffin Street?
A. That's correct.
Q. Now, were you in a vehicle or were you on foot?
A. We were in a vehicle.
Q. Is there any particular reason, what led you to first notice Zackary Brown in that alley?
A. Well because we noticed him walking and that's a very high drug . . .

MR. CABALLERO: [17] Judge, I object to the characterization of the neighborhood in one way or the other as high crime area, one of these terminologies. The man hasn't been charged with anything but failure to give his name. What people may do in the neighborhood is totally irrelevant to the case.

THE COURT: Okay, overruled.

MR. PATTON:

Q. Was there anyone else in that alley?
A. Yes sir, there was another subject wearing an overcoat.

Q. What did you notice about him, was there anything unusual?

A. He was limping, and as we approached them, they seemed to separate, or. . . .

Q. Had they been speaking to one another?

A. We were unable to tell that, if that had occurred.

Q. But they were together, is that correct?

A. They were either together or they were going to be together.

Q. Were they walking toward one another?

A. We couldn't tell, we just know that as soon as we drove up, they just separated, and if they were going towards each other, they went their separate ways, or if they had been together, they just separated.

Q. Did they walk past one another?

[18] A. I was unable to see that.

Q. Let me ask you this. You saw Mr. Brown in the alley along with this other subject, why then did you stop Zackary Brown?

A. Because it looked suspicious and we had never seen that subject in that area before.

Q. Why was it so suspicious for him to be in that area?

A. Because of . . .

MR. CABALLERO: Judge, here again I have an obligation to any characterization calling for some sort of conclusion that people standing in an alley talking to one another, if that's what they were doing, there's not even evidence that they were doing that. That being someplace with anybody is suspicious, there's no evidence of any crime. I object to any characterization as that activity being suspicious when it's not.

THE COURT: Okay, overruled, go ahead.

MR. PATTON:

Q. Okay, you stopped Zackary Brown, is that correct?

A. That's correct.

Q. Is Mr. Brown in this courtroom today?

A. Yes he is.

Q. Would you please identify him for the Court?

A. It's that gentleman sitting over there.



[19] Q. What color jacket is he wearing?

A. Navy Blue.

Q. Your honor, at this time I'd like the record to reflect that the witness has identified the defendant in this cause, Zackary Brown.

THE COURT: The record will so reflect.

MR. PATTON:

Q. Now you were in your patrol car at the time, is that correct, when you first noticed Mr. Brown?

A. Yes, I was.

Q. And did you get out of your patrol car and walk up to the alley to where Mr. Brown was?

A. No, we drove up.

Q. And you got out of the patrol car?

A. When we approached, yes.

Q. And what did you ask Mr. Brown?

A. We asked him what his name was and what he was doing in the alley.

Q. Are these the only questions you asked him at that time?

A. At that time, yes.

Q. And did he tell you his name at that time?

A. No he did not.

Q. Did he give any reason why he wasn't going to tell you his name?

[20] A. At the beginning he did not. When he had his hands in his pocket we also asked him if he would please take his hands out of his pocket, and he did not the first time. The second time he did, and that's when my partner patted him down.

Q. Well did he give you any reason why he didn't want to tell you what his name was?

A. No he did not.

Q. He just refused to tell you his name and left it at that?

A. The first couple of times we asked him, he refused.

Q. You asked him for his name more than once?

A. Yes.

Q. And on those occasions which you asked him for his name while there in the alley, he refused on all occasions to to give you his name?

A. Correct.

Q. Now, did you identify yourself as a police officer?

A. We were in uniform and we were in a patrol car, it was obvious that we were police officers.

Q. So you presumed that the defendant would realize from your uniform and also the vehicle you were driving, that you were police officers?

A. Correct.

Q. What was the Defendant's attitude during this time that [21] you confronted him in the alley?

A. He was very discourteous, he was yelling at us saying that we had no right, no reason to stop him.

Q. At all times were you polite and courteous towards him?

A. Yes we were.

Q. And you did give him ample opportunity to identify himself at the scene, is that correct?

A. That's correct.

Q. And what did you eventually do when he still refused to identify himself?

A. We put him under arrest, brought him to Central Station and booked him.

Q. I have no further questions.

CROSS EXAMINATION

BY MR. CABALLERO:

Q. Mr. Venegas, going back to the scene, this was daylight, was it not?

A. Yes sir.

Q. In fact, I think you said it was 12:45 P.M.?

A. Yes.

Q. And what were the weather conditions like?

A. Sunny and bright.

Q. Now that part of town were you were, was the alley paved or unpaved?

A. They alley was unpaved.



[22] Q. And it has a clear view. In other words, if you're going down Magoffin Street, you can just go right into the alley, can you not?

A. Yes.

Q. You say you saw two individuals at first when you and the other officer drove up to the scene, there were two individuals in the alley, is that correct?

A. Correct.

Q. This was on December 9th?

A. Yes.

Q. And one of the individual's was wearing a coat?

A. An overcoat.

Q. Is that rare in El Paso?

A. In sunny weather it is.

Q. In sunny weather it was, and did you ever stop that individual?

A. No.

Q. You never did, and when my client, Mr. Brown and the other individual were in the alley, when you first saw them, how far apart were they?

A. Couple of feet.

Q. Couple of feet, and were they facing each other or were their backs against each other?

A. They were walking away from each other.

Q. They were walking away from each other. At that point, [23] if that's the first thing you saw, you don't know if two people were just crossing each other in the alley or not, do you?

A. No.

Q. And you never did find out, did you?

A. No.

Q. Was the other individual, can you describe him by race?

A. It was a black man.

Q. And could you describe Zackary Brown for me?

A. He's a black man.

Q. How old is Zackary?

A. Mid twenties, approximately mid twenties.

Q. That part of town, is it rare to see black people in that part of town?

A. No, it's not.

Q. As a matter of fact, would I be correct in saying that it's an area of town probably where more blacks congregate than any other area?
A. I don't know if that's a fair statement.
Q. You don't know whether or not the area on Alameda Street right between Piedras and three or four blocks east is an area known to be frequented by blacks, officer?
A. It's frequented by blacks, but you said that it's the most highly populated area by blacks.
Q. No, I said frequented by blacks. Do you know of any [24] other area in town where blacks hang out, you see more blacks than you do on Alameda Street between Piedras and three blocks east officer?
A. Yes.
Q. What other area?
A. Dyer Street.
Q. Dyer Street, lot of military people up there?
A. Yes.
Q. So it would be fair to say that those two areas are ones where you see more blacks than any other?
A. Yes.
Q. Okay, so you see a black person in that part of town is not unusual, is it?
A. No, it's not.
Q. Have you seen, do you know every black that frequents the Alameda area?
A. Most of them.
Q. You know most of them, my question was, do you know every one of them?
A. No.
Q. And every time you meet a new one, do you stop him to ask his name?
A. No.
Q. Did you, was there any action by my client that he was armed or committed a crime at that time?
[25] A. No.
Q. The only thing you wanted to do was stop him and ask him his name?
A. Correct.



Q. That's all?
A. That's all.
Q. And that's what you did?
A. Yes.
Q. And when you did stop him and he told you, he asked you why did you stop me, isn't that true?
A. No.
Q. Or words to that effect, did he say you have no reason to stop me?
A. Correct.
Q. And did you tell him you had a reason?
A. Just told him that he was walking in the alley and that was a high drug problem area.
Q. And you asked him for his name?
A. Correct.
Q. And did he, aside from what he may have said officer, did he kick you or become disorderly or push you or anything like that?
A. No.
Q. And you didn't pat him down?
A. My partner patted him down.
[26] Q. Did he find any weapons on him?
A. No.
Q. Did you find any drugs on him?
A. No.
Q. And once you found out he hadn't been committing a crime, and you asked him for his name again, did he give it to you?
A. No.
Q. And what did you do then?
A. We arrested him.
Q. And for what?
A. For failure to identify.
Q. How many people have you arrested for those things before officer?
A. That was my first.
Q. That was your first. Is it, how long have you been on the force now?
A. Since October.

Q. In other words, you'd been on the force a little more than a month or so, and you made your first arrest for failure to identify?
A. Correct.
Q. Have you made any since?
A. Make any since?
Q. Have you arrested anybody since then for failure to [27] identify themselves?
A. No.
Q. Is it a rare thing for someone in the Police Department to arrest somebody for failure to identify?
A. I can only speak from my experience.
Q. Well, from your experience?
A. Yes.
Q. All right, when you go to Police School, were you advised that it was a crime to refuse to give an officer a person's name and address?
A. Yes.
Q. You were told that?
A. Yes, it's in the Penal Code.
Q. All right, but when you go to school they tell you, there are a lot of things in the Penal Code that you may not know about, but they told you though that was one of the things in the Penal Code?
A. Correct.
Q. And did they tell you that if someone, for absolutely whatever reason they had, refused to give you, a police officer, his name or her name, that you can then proceed to arrest him and book him?
A. Correct.
Q. And that's what you did with Mr. Brown?
A. Right.
[28] Q. And were you ever told since then that you shouldn't have done that or make sure that someone committed a crime, or you had reason to believe they did, or anything like that?
A. No, I have not.
Q. They've never told you otherwise?
A. No.



Q. The only reason you arrested him is because a person refuses to provide his name, is that correct?
A. Right.
Q. Where did you book my client, Mr. Brown?
A. Where did I book him?
Q. Yes sir?
A. County Jail.
Q. El Paso County Jail, and he was placed in there the same as any other prisoner that you may have picked up for committing a violation of some sort, is that correct?
A. Correct.
Q. And was there a bond placed on him?
A. I believe so.
Q. Do you recall the amount?
A. No.
Q. Did you have any more involvement with the case after that officer?
A. No, I did not.
[29] Q. Now when my client was booked at the County Jail, aside from patting him which your partner had already conducted, they searched him more thoroughly there, did they not, while being processed in the jail?
A. Yes.
Q. And do you participate in that process or is that something done by the Sheriff of El Paso County?
A. We give him another search before we take him to jail.
Q. All right, did you give my client, Mr. Brown, another search?
A. I believe he was taken to jail by my partner.
Q. By your partner?
A. I don't quite recall.
Q. Anyway he was searched again according to procedures?
A. Right.
Q. Was anything found of an illegal nature?
A. No.
Q. Officer, after you made the arrest, because my client refused to give you his name, when you were on the

way downtown to book him in the jail, he finally did tell you what his name was, didn't he?

A. Yes.

Q. But he had already committed the violation, is that correct?

A. Correct.

[30] Q. So once you had his name, it didn't help you any one way or the other, did it?

A. No.

Q. But in your opinion, the way this law is written, the crime had already been committed?

A. Correct.

Q. Pass the witness.

THE COURT:

Q. Did you ever ask him what his residence address was?

A. Yes, we did.

Q. Did he refuse to tell you that?

A. Before we placed him under arrest, before we arrested him, yeh, he refused.

Q. Including his address?

A. Yes, including his address.

MR. CABALLERO: That's all we have, your honor.

THE COURT:

Q. Didn't you go to Corporation Court to testify?

A. My partner went to Municipal Court I believe.

THE COURT: Okay, does the State have anything further?

MR. PATTON: The State rests, your honor.

MR. CABALLERO: [31] Judge, we have a motion for acquittal, and also we want to reurge our motion, which we filed earlier, for dismissal, and we just don't think the evidence is sufficient for a conviction.

THE COURT: Those motions are overruled.

MR. CABALLERO: Judge, we have no evidence to present.

THE COURT: Then the State rests and the Defense rests, both your motions are denied.

MR. CABALLERO: That's all I have, your honor.



THE COURT: Okay, then the Defense rests?

MR. CABALLERO: Yes sir.

THE COURT: And do both sides close?

MR. PATTON: Yes sir.

MR. CABALLERO: Yes sir.

THE COURT: Any argument.

[32] MR. PATTON: No argument, your honor.

MR. CABALLERO: We have none, Judge, we've already stated our position.

THE COURT: Then I'll find the Defendant guilty. Is there any evidence on the punishment that either side wishes to present?

MR. CABALLERO: No Judge, we have no further evidence.

THE COURT: Does the State have any?

MR. PATTON: No evidence, your honor.

THE COURT: Any argument about the punishment?

MR. CABALLERO: None Judge.

MR. PATTON: No, your honor.

THE COURT: Does the Defendant wish to say anything?

MR. BROWN: No, your honor.

THE COURT: Okay then, the punishment is a $45.00 fine and court [33] costs. Now, since I do so few of these, I'm not sure whether I impose sentence or whether the Defendant has ten days to accept sentence. In case he does, does he want to wait ten days or does he want to waive the ten days?

MR. CABALLERO: Judge, we will waive.

THE COURT: The Defendant so waives?

MR. BROWN: Yes sir.

THE COURT: Okay then, in case it's necessary, you're sentenced to a fine of $45.00 and court costs. Now we'll have to call the Clerk up here. Now, once you have this commitment you either have to pay it or go to jail, or make some other arrangements.

MR. CABALLERO: Judge, my intention is to file timely notice of appeal and to ask this Court for a stay of the execution of the sentence pending the appeal.

THE COURT: Where are you going to appeal, you can't appeal to the Court of Criminal Appeals?

MR. CABALLERO: Judge, we're going to file a notice of appeal to this Court, and the Court of Criminal Appeals has no jurisdiction [34] and I assume it's going to be to the Supreme Court of the United States.

THE COURT: Then we'll consider that the Judgement, the Court will stay the Judgment, the execution of the fine pending your perfection of the appeal to the United States Supreme Court. Please prepare an order for the Court to sign on the stay.

MR. CABALLERO: Yes sir.

THE COURT: Now if this were an ordinary appeal, all that would be stayed when you give your notice of appeal, but I don't know what the status is since it's under $100 fine. In case one is needed, it's granted. Now, we're here on the, there's some question now on the notice of appeal that would bring this case to this Court from the Municipal Court, and there was some delay in the filing in this Court. And the Court Reporter and the Court Secretary were all looking for this appeal, and we were notified by the Municipal Court that they had lost the appeal bond in this matter. And I think perhaps we should have some testimony that there was an appeal bond. Do you want your client to testify?

MR. CABALLERO: Yes, for those purposes Judge.

ZACKARY BROWN [35] being duly sworn, testified as follows, to-wit:

DIRECT EXAMINATION

BY MR. CABALLERO:

Q. State your name sir?
A. Zackary C. Brown.
Q. Mr. Brown, did you ever appear in Municipal Court on the charges that you failed to identify yourself on December 9, 1977?
A. Yes I did.
Q. And what was the finding of that Court?
A. The finding was guilty.
Q. Did you plead guilty or did the Court find you guilty?
A. The Court found me guilty.



Q. After the finding of guilty, did you ever file a notice of appeal and a proper appeal bond with the Clerk of the Municipal Court?
A. Yes I did.
Q. And when was that?
A. It was on the. . . .
Q. Well in terms of the time you were found guilty?
A. It was on the 12th or 13th, I'm not sure, it was the same day I came up to your office.
Q. And I told you to go down and file some papers?
A. Right.
Q. And you went down there and filed an appeal bond?
[36] A. Yes I did.
Q. That was two or three days after you were found guilty?
A. Yes it was.
Q. And were you ever notified that for some reason the papers had been lost?
A. Well I went down to the Clerk because I was attempting to find out whether or not the judgment of the fine would be stayed pending that appeal, and they told me that they couldn't locate it, they couldn't locate the bond, they said that they had lost it.
Q. Did you ever file another one?
A. Yes, the Clerk told me, she said, file another one and I will count that day as the starting of the ten days.
Q. So you did file another notice of appeal and another appeal bond?
A. Yes I did.
Q. Pass the witness Judge.

THE COURT: Do you have any questions?

MR. PATTON: No, your honor.

THE COURT: Well the Court has inquired with the Clerk of the Corporation Court, and is satisfied that Notice of Appeal and the Appeal Bond was filed timely, and that this Court has [37] jurisdiction in that the first appeal bond was in fact filed by the Court but was lost by the Clerk, and therefore that the appeal was

perfected at that time. Even though the appeal bond in here, for some reason they had to fill out a second one, and of course isn't in the proper order cause the time is up on it, but the Clerk did notify this Court that they had lost the appeal bond, the first appeal bond. Also, on this Information, this officer, you signed the information, right?

OFFICER VENEGAS: Yes sir.

THE COURT: And your name is up there on top as one of the complaining witnesses, right?

OFFICER VENEGAS: Correct.

THE COURT: We'll find that the complaining witness signed it, even though on the face of it it shows it was sworn to by the other officer, you swore to it and your name's in the body of it, correct?

OFFICER VENEGAS: Correct.

THE COURT: We'll find that the appeal is perfected properly and [38] before the Court, and the complaint is in proper form.

MR. CABALLERO: Judge, I'm here on appoint of this Court to handle this case, and of course have so far proceeded in forma pauperis, and I would like for the Court to enter an order, I don't know if it's necessary to file an amended order, to allow my client to proceed with this appeal in forma pauperis.

THE COURT: Okay, does the State have anything to say on that?

MR. PATTON: No, your honor.

THE COURT: Then the Defendant may proceed in forma pauperis on his appeal. For the record, Mr. Caballero is appointed to proceed on representing this man at the pleasure of the United States Supreme Court.

* * * *



THE STATE OF TEXAS )
)
COUNTY OF EL PASO )

I, Loretta A. Doerr, the Official Court Reporter in and for the County Court at Law No. 2 of El Paso County, Texas, hereby certify that I reported in shorthand the testimony introduced at the hearing in the foregoing styled and numbered cause, and afterwards the same was reduced to typewriting, and that the foregoing pages contain, to the best of my knowledge, a full, true and complete statement of the testimony introduced before the Court on said hearing.

WITNESS my hand, in my official capacity, this 16th day of February, 1978.

/s/ Loretta A. Doerr
LORETTA A. DOERR

THE STATE OF TEXAS )
)
COUNTY OF EL PASO )

We, the undersigned attorneys of record in the above captioned cause, do hereby agree that the foregoing typewritten pages contain a full, true and correct transcript, of all the testimony and proceedings had, and all documentary evidence introduced during the trial of said cause, if any.

We further agree that the foregoing transcript of the Court Reporter's notes contains all objections to the admission or conclusion of evidence, the rulings of the Court thereon, and the bills of exception taken thereto, and evidence in connection therewith, if any.

The undersigned attorneys further agree that this record shall be filed as the transcript of the Court Reporter's notes and bills of exception in this cause.

/s/ Craig Patton
CRAIG PATTON
Attorney for State

/s/ Raymond Caballero
RAYMOND CABALLERO
Attorney for Defendant



SUPREME COURT OF THE UNITED STATES

No. 77-6673

ZACKARY C. BROWN, APPELLANT

*v.*

TEXAS

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

October 16, 1978

40

SUPREME COURT OF THE UNITED STATES

No. 77-6673

ZACKARY C. BROWN, APPELLANT

*v.*

TEXAS

APPEAL from the County Court at Law Number Two, El Paso County,

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted. The case is set for oral argument in tandem with *Michigan* v. *DeFillippo*, No. 77-1680.

October 16, 1978

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-6673

ZACKARY C. BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

ON APPEAL FROM THE COUNTY COURT AT LAW
NO. 2, EL PASO COUNTY, TEXAS

# MOTION TO DISMISS OR AFFIRM

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ATTORNEYS FOR APPELLEE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

---

NO. 77-6673

---

ZACKARY C. BROWN, Appellant

V.

THE STATE OF TEXAS, Appellee

---

ON APPEAL FROM THE COUNTY COURT AT LAW
NO. 2, EL PASO COUNTY, TEXAS

---

MOTION TO DISMISS OR AFFIRM

---

Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the County Court at Law No. 2 of El Paso County, Texas, on the ground that the questions presented are so insubstantial as not to warrant further argument.

QUESTIONS PRESENTED

Whether Section 38.02(a) of the Texas Penal Code, on its face: (a) violates the first amendment to the United States Constitution because it punishes silence; (b) violates the fifth and fourteenth amendments' due process clauses because it is unconstitutionally vague and overbroad; (c) violates the fourth amendment because it constitutes an unwarranted invasion of the right to privacy; and (d) violates the fifth amendment's self-incrimination clause because it punishes silence.

STATUTE INVOLVED

Section 38.02(a) of the Texas Penal Code is set out in the Jurisdictional Statement at p. 2.

STATEMENT

This is a direct appeal from the final judgment of conviction entered against Appellant on February 1, 1978, in County Court at Law No. 2, El Paso County, Texas.

On December 9, 1977, shortly after noon, Appellant was stopped in an alley by two officers of the El Paso Police Department. One of the officers asked Appellant his name, but Appellant refused to give it, whereupon he was arrested for a violation of Section 38.02 of the Texas Penal Code.

Appellant was tried in Municipal Court No. 3 of the City of El Paso, Texas, found guilty, and assessed a fine of $20.00 plus court costs. He sought and obtained a trial de novo in the county court at law, where he waived trial by jury and pleaded not guilty.

Appellant's Motion to Set Aside Information, presenting essentially the same questions presented on this appeal, was denied by the judge of the county court at law. During the argument on the motion, Appellant's counsel indicated that he assumed the officers "had some reason to make an initial stop and ask a question or so." Transcript of Trial, p. 8.

The County Court at Law adjudged Appellant guilty and assessed him a fine of $45.00 plus court costs. The county court at law being the highest court of the state in which a decision could be had under art. 4.03, Texas Code of Criminal Procedure, an appeal was taken directly to this Court pursuant to 28 U.S.C. Section 1257(2).

ARGUMENT

I.

The Case Should be Dismissed for Failure to Raise A Substantial Federal Question

The insubstantiality of the questions presented on this appeal is apparent when two matters are considered. First, a predicate to prosecution under Section 38.02 is that the

person charged must have been lawfully stopped. Thus, under Terry v. Ohio, 392 U.S. 1 (1968), circumstances must have been present which gave the police officers an articulable, reasonable suspicion that a crime had just been committed or was about to be committed. In the trial court, Appellant's counsel assumed the presence of such factors and raised no challenge to the lawfulness of the stop, which, in any event, is irrelevant to the issue of the facial invalidity of Section 38.02(a).

Thus, this case does not present the situation of a random, indiscriminate stop by the police escalating into an arrest. Rather, it presents the situation of a lawfully stopped person being required to answer only the most rudimentary kind of investigative inquiry. Without the ability to make such an elementary inquiry and expect an answer, a police officer has little reason to make the stop which already has been sanctioned by Terry v. Ohio, supra, and which has no other purpose than investigation, however cursory.

The second matter suggesting the insubstantiality of the questions on this appeal is the absence of the onerousness typically associated with penalties for violation of a penal law. A violation of Section 38.02(a) is, under Section 38.02(b), a Class C misdemeanor which is punishable solely by a fine not to exceed $200.00. See Section 12.23, Texas Penal Code. Furthermore, since conviction of a Class C misdemeanor imposes no legal disability or disadvantage, see Section 12.03(c), Texas Penal Code, Appellant has suffered no legal disability beyond the imposition of the $45.00 fine.

II.

The Questions are Insubstantial in Light of Prior Decisions by this Court

(a) Appellant argues that Section 38.02(a) is unconstitutional on its face because it punishes silence, thereby violating the first amendment. The only Supreme Court case



cited by Appellant in support of his proposition is Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), which concerns itself with the wearing of arm bands as symbolic speech, not with silence as a first amendment right. Appellant has made no attempt to label his silence in the face of the officers' question as "symbolic speech." Similarly, Appellant has not attempted to justify his silence as a refusal to support some state supported religous, political, or moral idea. This case, therefore, is unlike Wooley v. Maynard, __U.S.__, 97 S.Ct. 1428 (1977), where the plaintiff, in effect, refused to support an ideology arguably espoused by the state through a slogan printed on its automobile license plates. Even if the inconceivable were accomplished and Appellant's silence is labeled as a form of expression, the state could offer sufficient justification for its interests in enforcing this statute and the state's criminal laws. Cf. Barenblatt v. United States, 360 U.S. 109, 126 (1959).

(b) Appellant argues that Section 38.02(a) is vague and overbroad, thereby violating the due process clauses of the fifth and fourteenth amendments. The attacked statute is neither vague nor overbroad. The elements necessary for a violation of Section 38.02(a) are clear and as precise as can reasonably be expected of statutory language. There must be a lawful stop, a request for the stopped person's name and address, and a refusal by the stopped person to give his name and address, which refusal must be intentional. This statute, therefore, is sufficiently definite "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Harriss, 347 U.S. 612, 617 (1954).

Appellant's attack on Section 38.02(a) for facial overbreadth is misplaced. Overbreadth analysis is employed in the context of first amendment rights, Broadrick v. Oklahoma, 413 U.S. 601 (1973), and, since no first amendment rights are implicated in this case, an attack in terms of overbreadth must fail. Furthermore, application of the overbreadth doctrine is to be employed only as a last resort, especially in the context of ordinary criminal laws such as the one at issue here. See Broadrick, supra.

(c) Appellant's claim that Section 38.02(a) is, under the fourth amendment, an unconstitutional invasion of the right to privacy lacks merit. The fourth amendment only protects people from governmental intrusions into matters in which they have a "reasonable expectation of privacy." Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring). A person hardly can be said to have a reasonable expectation of privacy in his name and address, especially when that person has been lawfully stopped by an officer in the first place. A person's name and address are routinely provided to government officers and agencies in a variety of situations -- for property taxes, for automobile registrations, for utility billing, etc. A police officer's asking a lawfully stopped person his name and requiring an answer is one of "the myriad daily situations in which policemen and citizens confront each other on the streets", Terry v. Ohio, 392 U.S. at 12, which does not implicate the fourth amendment.

(d) Appellant's argument that Section 38.02(a) violates the fifth amendment's self-incrimination clause because it punishes silence also lacks merit. First, there is nothing



incriminating about a person's name and address. In this context, a person's name and address are analogous to blood samples in that they are neither testimonial nor communicative in nature. See Schmerber v. California, 384 U.S. 757 (1966). See also United States v. Wade, 388 U.S. 218 (1967) (exhibition of the person at a post-indictment lineup) and Gilbert v. California, 388 U.S. 263 (1967) (handwriting exemplars). Additionally, Appellant has not indicated how either the implications of the question or its context suggest that a responsive answer or an explanation of why it could not be answered might have been dangerous because injurious disclosure could have resulted. Yet, such is necessary before the privilege can be invoked successfully. Hoffman v. United States, 341 U.S. 479 (1951).

## CONCLUSION

Wherefore, Appellee respectfully submits that the questions upon which the cause depend are so insubstantial as not to need further argument, and Appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the County Court at Law No. 2 of El Paso County, Texas.

Respectfully submitted,

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NO. 77-6673

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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THE STATE OF TEXAS

v.

ZACKARY C. BROWN

---

Appeal from the County Court at Law Number Two
El Paso County, Texas

---

# APPELLANT'S REPLY TO THE MOTION OF THE STATE OF TEXAS TO DISMISS OR AFFIRM

---

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-6673

THE STATE OF TEXAS

v.

ZACKARY C. BROWN

Appeal from the County Court at Law Number Two
El Paso County, Texas

**APPELLANT'S REPLY TO THE MOTION OF THE STATE OF TEXAS TO DISMISS OR AFFIRM**

In its Motion to Dismiss or Affirm, the State of Texas has contested only one point, and that is whether this case presents a substantial federal question.

Appellant contends that Section 38.02 of the Texas Penal Code is unconstitutional because it is overbroad and vague, because it punishes silence as a form of expression, because it allows an invasion of privacy, and because it takes away one's right to silence under police questioning. The State essentially counters with the position that the intrusion made legal by the statute is modest, is not burdensome, and is, therefore, constitutional.

The point presented in essence by this appeal is whether in this country one who is not under arrest for any crime, who is not suspected of having committed a crime, who is walking alone, who is otherwise unknown to the police, who is not evasive, and who did not witness any crime or civil wrong may walk away from police officers and refuse to answer any questions, even those regarding identity and residence, at a point before being placed under arrest.

The issue raised by Section 38.02 is not new. In 1928, dissenting in Olmstead v. United States, 277 U.S. 438, 478 (1928), Justice Brandeis wrote:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone--the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed to be a violation of the Fifth.

The "right to be let alone" is important. The books are replete with efforts on the part of the sovereign to intrude into a person's privacy. Those intrusions are invariably called necessary and are usually described as modest. And this Court has usually been vigilant to strike down many of those provisions recognizing that if we were ever to lose our freedom and liberty completely, the loss would occur not at once but rather by a gradual erosion of the principles of the Constitution. The sovereign often invites this Court to examine only a particular case rather than to place the law in question within the broader context of a series of laws which noticeably limit a person's rights, much like the case of a man who was killed by a thousand pin pricks and then trying to determine the cause of death by examining each pin prick individually.

So, in this case the State is telling this Court that one does not have the right to refuse to give one's name or address, since such a requirement would by itself involve only a modest intrusion.

In United States v. Brignoni-Ponce, 422 U.S. 873, 880, 883 (1975), this Court was invited by the Government to allow it to stop anyone near the Mexican border and inquire about their citizenship when those persons appear to be of Mexican ancestry. Justice Powell wrote for the majority:

> The intrusion is modest. The Government tells us that a stop by a roving patrol 'usually consumes no more than a minute....' According to the Government, '[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'
>
> * * *
>
> Although we may assume for purposes of this case that the broad congressional power over immigration ... authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in this country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

So unless there is reasonable suspicion that a crime has been committed, this Court does not allow random stops for questioning away from the border or its functional equivalent. Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); and United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

Those who propose those "minor" intrusions by Government often cite Terry v. Ohio, 392 U.S. 1 (1968), in support of



limited stops and searches. The State has cited Terry in their statement in this case. Terry, however, provides no shelter for the statute in question here. Terry simply represents a decision made by this Court to allow police officers a measure of safety while they investigate a subject. In Terry, the officer had some suspicions that Terry and two others were "casing a job, a stick-up," and the officer also feared that the trio was armed. A brief pat-down turned up a revolver and resulted in a gun prosecution. The limited search based on something less than probable cause was justified simply to protect the life of the police officer. No one in this case claimed to be in fear or to harbor any suspicions about Appellant. The majority in Terry did not address the facts of the case presented here, but Justice White in his concurring opinion did, and he wrote the following at page 34:

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

The right to silence described by Justice White is nearly absolute. Not only does silence not furnish a basis for arrest, silence may not be considered at all even as inferential evidence of guilt. Griffin v. California, 380 U.S. 612 (1965); Doyle v. Ohio, 426 U.S. 610 (1976); and United States v. Hale, 422 U.S. 171 (1975).

The right to remain silent was the first right mentioned by this Court in Miranda v. Arizona, 384 U.S. 436, 479 (1966),

he list of rights which must be told to a person who is
rived of his freedom in any significant way and who is ques-
ned. In view of all the publicity about the Miranda deci-
n, one could expect that the public might believe that one
s indeed have the right to remain silent. If one has the
ht to remain silent after arrest, surely the invocation of
t right prior to arrest should not furnish the basis for
arrest itself so that the officer can then advise the
estee that he then had the right to remain silent. Thus,
position of the State of Texas here is that one must be
ested in order to have the right to remain silent, a thor-
hly confusing and obviously illogical contention.

In its analysis the State has failed to note the distinc-
n between police action found warranted in situations where
izens were not called upon to perform an act or compelled
speak, and those cases where persons were punished for
ir failure or refusal to do something which was protected
the Constitution.

With the possibility of a very narrow exception recognized
this Court in border cases, no one may be compelled to break
ence or be punished for silence. It is much the same as the
nciples that one may not be compelled to produce his private
ers, Boyd v. United States, 116 U.S. 616 (1886). Nor may
be punished for invoking a constitutional right, Camara v.
icipal Court, 387 U.S. 523 (1967); and See v. City of Seattle,
U.S. 541 (1967).

The compulsion exacted by the Texas statute in this case
s afoul of both the Fourth and Fifth Amendments because it
pels speech when the Constitution protects silence, and it
o invades one's right of privacy. See Boyd v. United States,



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supra; United States v. Chadwick, 433 U.S. 1 (1977); and Katz v. United States, 389 U.S. 347 (1967). Clearly this case presents several substantial federal questions. The questions presented may be even more substantial if other states have similar statutes.

Perhaps this case is an example of those cases noted by this Court in Terry, of which minority groups complain and which constitute the systematic harassment of a minority group*-- in this case, blacks. While the exclusionary clause will not stop that improper conduct, the use of a vague state statute used to punish innocent conduct should not be condoned.

---

* This Court in Terry noted in a footnote the possibility that police agencies might use harsh police methods to impose their "rule" in minority areas.

> The President's Commission on Law Enforcement and Administration of Justice found that "[i]n many communities, field interrogations are a major source of friction between the police and minority groups." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police 183 (1967). It was reported that the friction caused by "[m]isuse of field interrogations" increases "as more police departments adopt 'agressive patrol' in which officers are encouraged routinely to stop and question persons on the street who are unknown to them, who are suspicious, or whose purpose for being abroad is not readily evident." Id., at 184. While the frequency with which "frisking" forms a part of field interrogation practice varies tremendously with the locale, the objective of the interrogation, and the particular officer ... it cannot help but be a severely exacerbating factor in police-community tensions. This is particularly true in situations where the "stop and frisk" of youths or minority group members is "motivated by the officers' perceived need to maintain the power image of the beat officer, an aim sometimes accomplished by humiliating anyone who attempts to undermine police control of the streets." Ibid.

For all the foregoing reasons, as well as for those stated in his Jurisdictional Statement, Appellant urges this Court to note probable jurisdiction in this case, to demand briefs, and to set the case down for full hearing and argument.

Respectfully submitted,

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By: Raymond C. Caballero
RAYMOND C. CABALLERO

Certificate of Service

I do hereby certify that on this 28th day of July, 1978, a true and correct copy of the foregoing Appellant's Reply to the Motion of the State of Texas to Dismiss or Affirm was mailed to Honorable John L. Hill, Attorney General of Texas, P. O. Box 12548, Capitol Station, Austin, Texas, 78711.

Raymond C. Caballero
RAYMOND C. CABALLERO

Supreme Court, U. S.
FILED
DEC 8 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

October Term, 1978

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**No. 77-6673**

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ZACKARY C. BROWN,

*Appellant*

v.

THE STATE OF TEXAS.

---

**Appeal from the County Court at Law**
**Number Two**
**El Paso County, Texas**

---

# BRIEF OF APPELLANT

---

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IN THE

# Supreme Court of the United States

October Term, 1978

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**No. 77-6673**

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ZACKARY C. BROWN,

*Appellant,*

v.

THE STATE OF TEXAS.

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**Appeal from the County Court at Law Number Two**
**El Paso County, Texas**

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## BRIEF OF APPELLANT

This is a direct appeal from the County Court at Law Number Two for El Paso County, Texas. Appellant was charged by information in that court with failure to identify himself, in violation of Section 38.02(a) of the *Texas Penal Code.* Appellant moved to set aside the information because Section 38.02(a) was unconstitutional on its face as vague and overbroad, because it punished protected expression, invaded the right to privacy, and because it compelled

speech when the Constitution protected silence. The trial court denied the motion but questioned the constitutionality of the statute. In a non-jury trial, Appellant was found guilty as charged and was fined $45.00. Because the Texas Court of Criminal Appeals hears only those cases where the fine exceeds $100.00, a direct appeal was taken to this Court. On October 16, 1978, this Court noted probable jurisdiction.

## A. REPORTS

The County Court at Law Number Two is a court of record but wrote no opinion in this case. Because it is not an appellate court, none of its proceedings are recorded in official or unofficial reporters. The statute in question has never before been reviewed by an appellate court.

## B. JURISDICTION

Appellant was charged with violating Section 38.02(a) of the *Texas Penal Code* in that he allegedly refused to give a report of his name and residence address to a peace officer who had lawfully stopped him and requested the information. Appellant was fined the sum of $45.00 (App. 6). The judgment of the County Court at Law Number Two was entered on February 1, 1978 (App. 6). A Notice of Appeal was filed with that court on February 3, 1978 (App. 10)



and an Amended Notice of Appeal was filed on February 14, 1978 (App. 13).

This Court has jurisdiction by virtue of Section 1257(2), Title 28, *United States Code,* which provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court .... [b]y appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The judgment of the County Court at Law in this case is a decree rendered "by the highest court of a State in which a decision could be had," because pursuant to Article 4.03 of the *Texas Code of Criminal Procedure,* no appeal may be had to the Texas Court of Criminal Appeals where the fine imposed does not exceed $100.00. Article 4.03 of the *Texas Code of Criminal Procedure* provides as follows:

> The Court of Criminal Appeals shall have appellate jurisdiction coextensive with the limits of the State in all criminal cases. This Article shall not be so construed as to embrace any case which has been appealed from any inferior court to the county court, the county criminal court, or county court at law, in which the fine imposed by the county court, the county criminal court or county court at law shall not exceed one hundred dollars.

The Texas Court of Criminal Appeals has previously held that where one is fined less than $100.00 in a county court at law, there is no appeal to the Texas Court of Criminal Appeals. *Coates* v. *State of Texas,* 308 S.W.2d 869 (Tex.Ct.Crim.App. 1957).

## C. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In this appeal Appellant questions the constitutionality of Section 38.02 of the *Texas Penal Code,* which provides as follows:

§ 38.02. FAILURE TO IDENTIFY AS WITNESS

(a) A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

That statute may be found at page 68, Volume 4, of the *Texas Penal Code, Vernon's Texas Codes Annotated.*

This case also involves the following amendments to the Constitution of the United States of America:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of



speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## D. QUESTIONS PRESENTED

**QUESTION I: Section 38.02(a) of the *Texas Penal Code* violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is vague and overbroad on its face.**

**QUESTION II: Section 38.02(a) of the *Texas Penal Code* is unconstitutional because it punishes conduct protected by the First Amendment to the United States Constitution.**

**QUESTION III: Section 38.02(a) of the *Texas Penal Code* is unconstitutional because it violates the Fourth Amendment to the United States Constitution as making lawful unwarranted invasions to one's right of privacy.**

**QUESTION IV: Section 38.02(a) of the *Texas Penal Code* is unconstitutional and in violation of the Fifth Amendment to the United States Constitution because it compels speech under pain of arrest when the Constitution protects silence.**



## E. STATEMENT OF THE CASE

Shortly after noon on December 9, 1977, El Paso Police Patrolman Venegas and his partner were driving on Magoffin Street in the City of El Paso. They were patrolling the area and saw Appellant, Zackary Brown, walking down an alley. Another person was seen walking in the alley, but the officers could not state that Appellant and the other pedestrian had met or had talked to each other (App. 23, 24).

The officers drove into the alley, stopped Appellant, and asked him his name and what he was doing in the alley. Appellant refused to give his name. Appellant was arrested. The officer noted that Appellant is a black male in the mid-20's (App. 27) and that he stopped Appellant because he had not seen him in the area before (App. 24). The officer admitted that many blacks are found in that area of town. The officer stated that he suspected no crime or that Appellant was armed (App. 28), but that he just wanted to stop and ask Appellant his name (App. 28). Appellant was patted down and was taken to the jail for booking. No contraband or weapons were discovered in any search (App. 29, 31).

On the way to jail Appellant did tell the officers his name, but he was still booked. The officer noted that the violation was already complete (App. 32).

## F. SUMMARY OF ARGUMENT

1. Section 38.02(a) of the *Texas Penal Code* is void because it is vague and overbroad on its face. The statute employs words, "lawfully" and "stops," which create confusion and which are not words that are commonly understood. The statute is lacking in ascertainable standards of guilt so as to give reasonable notice of the conduct which it seeks to prohibit. Section 38.02(a) is broad on its face because it punishes protected conduct. Most probably the law was intended to apply to material witnesses, but as written the statute applies to witnesses and nonwitnesses alike.

2. Section 38.02 of the *Texas Penal Code* is void because it seeks to punish conduct protected by the First Amendment. Under previous decisions of the Court it has been held that one has the right to refuse to answer questions from the police, to question a police stop, and perhaps to walk away while a policeman is asking questions.

3. Section 38.02(a) of the *Texas Penal Code* is invalid because it makes lawful unwarranted intrusions into one's right of privacy. The statute appears to allow investigatory stops or detentions on grounds less than those set out in *Terry* v. *Ohio*. The statute compels a person to answer questions under pain of arrest. In sum, the statute allows police to intrude under *any* circumstances and demand a person to identify himself. The statute was not drawn in such



a manner which would protect those state interests which the legislature apparently was seeking to advance.

4. Section 38.02(a) of the *Texas Penal Code* is void because it compels speech when the Constitution protects silence. It is illogical to allow the arrest of a person for silence, and then advise the arrestee, per *Miranda*, that the arrestee then has the right to remain silent. The right to remain silent is obviously present before arrest, except in some limited cases where, in order to advance strong governmental interests, individual rights might be subordinated.

## G. ARGUMENT

**QUESTION I: Section 38.02(a) of the *Texas Penal Code* violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is vague and overbroad on its face.**

This Court has held for a number of years now that most of the clauses of the First, Fourth, and Fifth Amendments to the United States Constitution are applicable to the states through the Fourteenth Amendment Due Process Clause. *Thornhill* v. *Alabama*, 310 U.S. 88 (1940); *Mapp* v. *Ohio*, 367 U.S. 643 (1961); and *Malloy* v. *Hogan*, 378 U.S. 1 (1964).

In addition to those rights, this Court has also held that certain fundamental and procedural due process

rights were applicable to the states through the Fourteenth Amendment Due Process Clause. Among those is the requirement that penal statutes be drafted in such a manner that the conduct which they purport to prohibit is clearly known from a reading of the statute.

The requirement of certainty in state penal provisions was noted by this Court in *Connally* v. *General Const. Co.*, 269 U.S. 385, 391 (1926), in which this Court stated as follows:

> That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.

See also *Lanzetta* v. *New Jersey*, 306 U.S. 451 (1939); and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972).

In one of the most publicized decisions of this Court, it was held in *Miranda* v. *Arizona*, 384 U.S. 436, 444 (1966), that a person has a constitutional right to remain silent. Indeed, it was the first of several rights which were listed by this Court and which



this Court held must be told to a person placed under arrest. It would not be an exaggeration to state that the man on the street, the layman, would believe that the right to silence was his to invoke.

Nevertheless, a reading of Section 38.02(a) gives no guidance concerning the circumstances which would give rise to the application of Section 38.02(a) in light of one's right to silence. The statute requires one to give a report of his name and address when "lawfully stopped" by a peace officer. What does "lawfully stopped" mean? Is there any question but that "men of common intelligence must necessarily guess at its meaning and differ as to its application?" *Connally* v. *General Const. Co., supra.* Obviously, courts have struggled with the concepts of "stops," "detentions," and "arrests" for so many years that the terms themselves are vague to lawyers, Supreme Court justices, and obviously to laypersons. And even more complex and confused is the meaning of the term "lawfully." Its meaning is so subjective and so imprecise that one might reasonably feel that he was not lawfully stopped, and therefore Section 38.02(a) was inapplicable to him. For example, in *Norwell* v. *Cincinnati*, 414 U.S. 14 (1973), Norwell, a 69-year-old gentleman, was stopped by a policeman while he was walking home. The police officer had received a report that there was a "suspicious man" in the neighborhood. When approached by the policeman who wished to stop and question him, Norwell told the officer: "I don't tell you people anything." He was then

placed under arrest for disorderly conduct. This Court reversed the conviction, stating:

> Upon this record, we are convinced that petitioner was arrested and convicted merely because he verbally and negatively protested Officer Johnson's treatment of him. Surely, one is not to be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer.

414 U.S. at 16.

So apparently, as in this case, one does have the right to question a stop, at least verbally. In this case there was not even a "suspicious person" report. All we have is an officer's curiousity. Therefore, there is no fair notice that refusal to answer an officer's questions would be a violation. *United States* v. *Harriss,* 347 U.S. 612 (1954).

A statute which is vague and which is lacking in ascertainable standards of guilt so as to give a reasonable notice of the conduct which is prohibited is unconstitutional. *Palmer* v. *Euclid,* 402 U.S. 544, 545 (1971).

In addition to facial vagueness, Section 38.02(a) is unconstitutional because it is overbroad on its face. A statute may be attacked for facial vagueness and overbreadth even if it appears valid as applied to the conduct of the accused raising the issue. *Plummer* v. *Columbus,* 414 U.S. 2 (1973).



Clarity must exist not only as discussed in the vagueness problem above, but also in the scope of application of the statute. Where a statute possibly makes criminal protected conduct, it is overbroad. *Gooding* v. *Wilson,* 405 U.S. 518 (1972); *Broadrick* v. *Oklahoma,* 413 U.S. 601 (1973); *Plummer* v. *Columbus, supra;* and *Hess* v. *Indiana,* 414 U.S. 105 (1973). In cases involving First Amendment rights, this Court has traditionally looked much closer at any statute potentially infringing on such protected activities. Those laws possibly punishing First Amendment protected speech or expression must be "narrowly drawn to prevent the supposed evil." *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940); *Ashton* v. *Kentucky,* 384 U.S. 195 (1966); and *Keyishian* v. *Bd. of Regents of U. of St. of N.Y.,* 385 U.S. 589 (1967).

With respect to Section 38.02(a), it is possible that a similar statute could have been drafted so as to cure its overbreadth. The caption of the section states: "Failure to Identify as Witness," but the body of the provision does not mention the word "witness." The section on its face applies to everyone, witnesses and nonwitnesses alike. There is, however, an indication that the overbreadth was not intended by the legislature.

Section 38.02(a) replaced Article 2.24 of the *Texas Code of Criminal Procedure,* which was repealed in

1973 upon the enactment of Section 38.02(a). Article 2.24 provided as follows:

IDENTIFICATION OF WITNESSES

> Whenever a peace officer has reasonable grounds to believe that a crime has been committed, he may stop any person whom he reasonably believes was present and may demand of him his name and address. If such person fails or refuses to identify himself to the satisfaction of the officer, he may take the person forthwith before a magistrate. If the person fails to identify himself to the satisfaction of a magistrate, the latter may require him to furnish bond or may commit him to jail until he so identifies himself.

This old Article 2.24 which was repealed has several useful points not found in new Section 38.02(a). First, it specifically states that the officer must have reason to believe that a crime was committed. Second, it was not a penal statute and did not give the officer the unfettered right to place a subject under arrest for the mere refusal to speak. Third, a neutral and detached magistrate made the final decision, and presumably if the officer could not show that the subject was a witness to a crime, not even the magistrate could compel the subject to state his name.

New Section 38.02(a) has none of the foregoing protections and can apply to anyone whether a crime was committed or not. This Court has long recognized the right of a state to question material witnesses to a crime, and indeed, to detain them if necessary. *Stein*



v. *New York*, 346 U.S. 156, 184 (1953). See also, Rule 46(g), *Federal Rules of Criminal Procedure*, and Section 3149, Title 18, *United States Code*. In expanding the statute here beyond the reach of material witnesses, the legislature made the statute too broad and, therefore, unconstitutional because the new statute then made criminal conduct protected by the First, Fourth, and Fifth Amendments as applied to the states through the Fourteenth Amendment Due Process Clause.

**QUESTION II: Section 38.02(a) of the *Texas Penal Code* is unconstitutional because it punishes conduct protected by the First Amendment to the United States Constitution.**

In several decisions this Court has held that the Fourteenth Amendment Due Process Clause makes applicable the First Amendment to the United States. *Gitlow* v. *New York*, 268 U.S. 652 (1925); *Near* v. *Minnesota*, 283 U.S. 697 (1931); *De Jonge* v. *Oregon*, 299 U.S. 353 (1937); *Thornhill* v. *Alabama, supra; Cantwell* v. *Connecticut, supra;* and *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942). The First Amendment rights include not only the right to free speech, but also the right to symbolic speech as well. *Tinker* v. *Des Moines*, 393 U.S. 503 (1969).

This Court has, however, declined to state that one has an absolute right of free speech, and in several

decisions various types of speech have been excluded from the protective reach of the First Amendment. For example, advocating criminal behavior with the intent to incite others to criminal action, *Dennis* v. *United States,* 341 U.S. 494 (1951); and *Yates* v. *United States,* 354 U.S. 298 (1957); libel, *Beauharnais* v. *Illinois,* 343 U.S. 250 (1952); obscenity, *Roth* v. *United States,* 354 U.S. 476 (1957); and fighting words, *Cantwell* v. *Connecticut, supra;* and *Chaplinsky* v. *New Hampshire, supra.*

This Court has developed a balancing test to weigh the policy encouraging freedom of expression against whatever the state interest was asserted in the particular case. The test was stated in *United States* v. *O'Brien,* 391 U.S. 367, 376 (1968):

> This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. To characterize the quality of the governmental interest which must appear, the Court has employed a variety of descriptive terms: compelling; substantial; subordinating; paramount; cogent; strong. Whatever imprecision inheres in these terms, we think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction



> on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Whatever the words used, in addition to being outside the protection of the First Amendment, they must lead a court to believe that their utterance caused a clear and present danger. *Schenck* v. *United States,* 249 U.S. 47 (1919).

The right to freedom of expression protected and encouraged by the First Amendment does not mean that the speech or expression will be pleasing to those who see or hear it. *Terminiello* v. *Chicago,* 337 U.S. 1, 4 (1949). Merely uttering strong and displeasing words, even profane ones, when there is no clear and present danger does not mean that one may be prosecuted. See, *Eaton* v. *City of Tulsa,* 415 U.S. 697 (1974), in which this Court reversed a contempt conviction where the accused said "chicken-shit" in court; *Hess* v. *Indiana, supra,* in which this Court reversed a conviction under the Indiana disorderly conduct statute where the accused told a crowd at an antiwar demonstration: "We'll take the fucking street later (or again);" or *Wiegand* v. *Seaver,* 504 F.2d 303 (5th Cir. 1974), in which the Court reversed a conviction under the Florida disorderly conduct statute for having caused a disturbance in a saloon and uttering the words "goddamn son-of-a-bitch." See also, *Plummer* v. *Columbus, supra,* where a cab driver made "a series of absolutely vulgar, suggestive, and abhorrent, sexually-oriented statements" to his passenger. In *Plum-*

*mer,* however, the statute was held void on its face, even though the speech involved might not have been protected.

Here we have a case in which, at most, Appellant questioned the legality of the stop and the motives of the officers in making the stop. But he was not arrested for the conduct, according to the officer. Rather, he was arrested for refusing to answer questions. This Court is capable of recognizing the abuse by law enforcement of citizens who question authority; it has on several occasions taken notice of such an abhorrent practice. *Oestereich* v. *Selective Service System Local Board No. 11,* 393 U.S. 233 (1968); *Gutkencht* v. *United States,* 396 U.S. 295 (1970); and *Norwell* v. *Cincinnati, supra.*

Other than to satisfy an officer's curiousity and then his vindictiveness when Appellant refused to speak, what are the interests of the state which could override the right to remain silent here and say nothing or to question the authority of police? This is the question which the state will address in its brief, but in the court below the prosecutor noted the state's interests to be the following:

> Well, the Governmental interest to maintain the safety and security of the society and the citizens to live in the society, and there are certainly strong Governmental interests in that direction and because of that, these interests outweigh the interests of an individual for a certain amount of intrusion upon his personal liberty. I think these Governmental interests outweigh the individual's interests in this respect, as far as simply asking an individual for his name and address under the proper circumstances.

(App. 16).

> I think in a way not identifying oneself tends to thwart the police power. Because, for instance, if an individual has committed a crime and if he refuses to identify himself, that tends to thwart the process.

(App. 17).

The interests listed by the prosecutor clearly are inapplicable in this case, and the statute is not drawn in such a manner to protect only those state interests. First, there was not even an allegation by the state that there was any danger posed here to anyone's security. Second, since no crime was even suspected, there could be no "thwarting" of the process where an individual committed a crime and refused to identify himself.

Perhaps in its brief before this Court, the state can list some other interests which might apply here. But given those which were listed below, under the *O'Brien* test, forcing one to divulge his name and address to satisfy an officer's curiosity when no crime was even suspected does not further "an important or substantial governmental interest. . . ."

This case is governed by this Court's decision in *Norwell* v. *Cincinnati, supra,* in which it was held that

one cannot "be punished for nonprovocatively voicing his objection to what he obviously felt was a highly questionable detention by a police officer." Such words were constitutionally protected speech.

Inasmuch as this statute as applied here and on its face punishes speech and nonspeech which is clearly protected, the statute is invalid.

**QUESTON III: Section 38.02(a) of the *Texas Penal Code* is unconstitutional because it violates the Fourth Amendment to the United States Constitution as making lawful unwarranted invasions to one's right of privacy.**

Although this discussion comes under the Fourth Amendment, it should be noted that the right of privacy recognized by this Court long ago is not only protected by the Fourth Amendment, but also comes under the shelter of the other Amendments. In *Griswold* v. *Connecticut*, 381 U.S. 479, 483-484 (1965), this Court Stated that "... the First Amendment has a penumbra where privacy is protected from governmental intrusion," and that several other "guarantees create zones of privacy," including the First, Third, Fourth, Fifth, and Ninth Amendments.

This right of privacy, however, will be discussed in this section, as discussion of that right has generally revolved around Fourth Amendment problems.

There are those who believe that one's right to privacy, if it exists at all, begins and ends in the home.



The right to be free from police questioning, eavesdropping, and surveillance clearly becomes less absolute once a person leaves his home, or where the person is on the street, in a car, or in public places. No specific rule has been laid down, but generally this Court has held that the Fourth Amendment protects those things which most of us might consider to be private even if the police did not intrude into one's property. *Katz* v. *United States*, 389 U.S. 347 (1967); and *Silverman* v. *United States*, 365 U.S. 505 (1961).

In abandoning the concept that the right to privacy is protected only within one's property, this Court followed the general principles espoused by Justice Brandeis in his early well-known article, "The Right of Privacy," 4 Harvard L. Rev. 193 (1890), and later in his dissent in *Olmstead* v. *United States*, 277 U.S. 438, 478-479 (1928). In *Olmstead*, Justice Brandeis was advocating a broader concept of the right to privacy, one not limited by concepts of property law or any other law, but rather guided by a notion that a person's liberty and freedom were to be protected in many different ways from unreasonable and unwarranted intrusions. Written in 1928, and quoted hundreds of times since then, the concept was stated as follows:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain,

> pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

Necessarily, and in line with Fourth Amendment cases generally, the right to privacy, or the right to be free from arrest or detention when there is no indication that a crime has been committed, or to be free from searches or seizures on grounds less than probable cause, are measured against the intrusions involved with a standard of reasonableness. With some limitations, the greater the need of the state to intrude and the closer one comes to having probable cause, the more likely it will be that the intrusion will be upheld. Reasonableness, like privacy, is a fluid concept. *Harris* v. *United States,* 331 U.S. 145 (1947).

Does the Constitution today protect citizens from unwarranted detention based on less than probable cause solely because of law enforcement claims that they desire such detentions? Again, with some very limited exceptions, the answer is that the Constitu-



tion does grant that security. *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Spinelli* v. *United States,* 393 U.S. 410 (1969); *Beck* v. *Ohio,* 379 U.S. 89 (1964); *Draper* v. *United States,* 358 U.S. 307 (1959); and *Brinegar* v. *United States,* 338 U.S. 160 (1949). This Court has allowed a few, but limited, exceptions to the requierment for probable cause, such as consent, *United States* v. *Watson,* 423 U.S. 411 (1976); border searches, *United States* v. *Martinez-Fuerte,* 428 U.S. 543 (1976); hot pursuit, *Warden* v. *Hayden,* 387 U.S. 294 (1967); "stop and frisk," *Terry* v. *Ohio,* 392 U.S. 1 (1968); and inventory searches, *Cooper* v. *California,* 386 U.S. 58 (1967).

Section 38.02(a) allows the arrest of a person where there is no indication that the accused has either committed or witnessed a crime, or indeed, when there is no indication that anything, civil or criminal, has occurred. It is principally used to give an officer a pretext for an arrest or search, when no other violation can be found. In at least one case it has been reported that officers have refused to accept certain types of identification in addition to verbal reports to identification. *Heath, et al.* v. *Brown, et al.,* No. CA-4-77-204 (N.D. Tex.).

This Court has reviewed a number of similar statutes which allow arrests for conduct which falls short of conduct one might consider criminal. In some cases states have attempted to make criminal neutral activities such as loafing or sitting, or walking with no particular purpose. In those vagrancy or suspicious

person cases, this Court held the ordinances void for vagueness. But in doing so this Court necessarily recognized that there are many types of conduct which cannot be criminal, regardless of their characterization.

> The difficulty is that these activities [walking, strolling, wandering, loafing, loitering] are historically part of the amenities of life as we have known them. They are not mentioned in the Constitution or in the Bill of Rights. These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-conficence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

*Papachristou* v. *Jacksonville, supra,* at p. 164. See also *Palmer* v. *Euclid, supra.*

This Court, for many years, has recognized the right of citizens in this country to speak out, even when obnoxious, to walk, even when it seems to others to have no purpose, and to preach, even when others do not care to listen. Obviously, as in *Norwell,* one has the right to protest a questionable detention or attempted interrogation. In all these cases, therefore, this Court has recognized several activities which are beyond the reach of penal statutes. Those rights are part of our general "right to be let alone." Certainly,



silence, when there is no compelling reason to speak, is one of those. If we protect the right of some to use profane speech, can the right to silence be any less secure?

It might be said by the state here that the Fourth Amendment only applies after arrest and that here we are only dealing with a "stop." But in *Davis* v. *Mississippi,* 394 U.S. 721, 726 (1969), this Court rejected a similar notion and held "that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' "

Section 38.02(a) allows a peace officer to demand that any person identify himself regardless of his activity, or the circumstances. The demand could take place in a saloon or a synagogue, an office or a mill. The state, at least so far, has not justified the scope of Section 38.02(a). The state has, however, in its Motion to Dismiss or Affirm, shrugged off the potentially offensive sweep of the statute by stating that intrusions under the statute are "modest." This is a familiar argument. But this Court has usually been vigilant to the fact that if we were ever to lose our liberty and freedom completely, it would occur not at once, but one small step at a time. We are not vigilant enough to combat "modest" incursions into and limitations of our freedom.

> Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers.

> The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.

*Olmstead* v. *United States, supra,* at p. 479 (dissent by Brandeis).

So the state argues in its motion that there is a right to "stop and frisk," for example, under *Terry* v. *Ohio, supra. Terry* v. *Ohio* does give the police such a right, but in that case at least two factors were significantly different: (1) the officer suspected that the suspects were "casing the job," and (2) the officer had reason to believe that the suspects were armed. Neither of those factors was present in this case, nor does Section 38.02(a) provide that there must be any indication of a crime or danger for the provisions of that statute to apply.

*Terry* v. *Ohio* is a difficult case. This Court in that decision has allowed stops and limited searches on something less than probable cause. One cannot justify that decision under the Fourth Amendment. About the only way to explain it is that this Court, as a practical matter, decided to allow police officers a measure of safety while they stopped a person to question him.

A policeman, just like any person, can ask a person to stop to answer questions. It may be good police work to stop and ask questions. *Palmer* v. *Euclid, supra,* at p. 546. But what can a policeman do when the subject refuses to answer questions and just



walks away? The answer is that the policeman can do nothing and a person has the right to walk away, unless there is reason to believe that the accused committed a crime other than refusing to answer. In *Norwell* v. *Cincinnati, supra,* this Court held that a person may question an arrest and walk away. In *Palmer* v. *Euclid, supra,* at p. 546, this Court stated:

> A policeman has a duty to investigate suspicious circumstances, and the circumstance of a person wandering the streets late at night without apparent lawful business may often present the occasion for police inquiry. *But in my* [*Harlan*] *view government does not have constitutional power to make that circumstance, without more, a criminal offense.* (Emphasis added)

In *Davis* v. *Mississippi, supra,* at p. 727, fn. 6, Justice Brennan wrote for the majority:

> The State relies on various statements in our cases which approve general questioning of citizens in the course of investigating a crime. [Citations omitted] But these statements merely reiterated the settled principle that while the police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

In *Terry* v. *Ohio, supra,* at p. 34, Justice White, concurring wrote:

> There is nothing in the Constitution which prevents a policeman from addressing questions to

> anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

See also, *State* v. *Tsukiyama,* 525 P.2d 1099 (Hawaii, 1974); *State* v. *Baxter,* 413 P.2d 638 (Wash. 1966); and ALI, Model Code of Pre-Arraignment Procedure (Draft No. 1), Article 110, Section 110.1(1).

So, at least by dictum, this Court has considered situations like that presented in this case and has stated that one can indeed walk away. In *Norwell* the Court's decision was that one had the right to walk away.

So the "modest intrusion" of requiring one to anwser questions against his will is not condoned. And where a vehicular stop is concerned, this Court has stated that random stops away from the border or at places not the funcitonal equivalent of the border are not condoned. Section 38.02(a) is not limited to pedestrians. It can be used to stop vehicles as well.



In *United States* v. *Brignoni-Ponce,* 422 U.S. 873, 880, 883 (1975), this Court was invited by the government to allow it to stop anyone near the Mexican border and inquire about their citizenship when those persons appeared to be of Mexican ancestry. Justice Powell wrote for the majority:

> The intrusion is modest. The Government tells us that a stop by a roving patrol 'usually consumes no more than a minute.' . . . According to the Government, '[a]ll that is required of the vehicle's occupants is a response to a brief question or two and possibly the production of a document evidencing a right to be in the United States.'
>
> * * * * *
>
> Although we may assume for purposes of this case that the broad congressional power over immigration . . . authorizes Congress to admit aliens on condition that they will submit to reasonable questioning about their right to be and remain in the country, this power cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens. For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.

So unless there is reasonable suspicion that a crime has been committed, this Court does not allow random

stops for questioning away from the border or its functional equivalent. *Almeida-Sanchez* v. *United States,* 413 U.S. 266 (1973); *United States* v. *Ortiz,* 422 U.S. 891 (1975); and *United States* v. *Martinez-Fuerte, supra.*

Now that we see that the broad right of privacy does protect silence, how can the police compel speech? Ever since *Boyd* v. *United States,* 116 U.S. 616 (1886), it has been recognized that compelling production of documents when the Constitution protects silence is a violation both of the Fourth and Fifth Amendments. See also, Brandeis dissent in *Olmstead* v. *United States, supra.*

**QUESTION IV: Section 38.02(a) of the *Texas Penal Code* is unconstitutional and in violation of the Fifth Amendment to the United States Constituion because it compels speech under pain of arrest when the Constitution protects silence.**

The issues in this case are all so related that it is difficult to cut off discussion of one to start discussion of the other, for necessarily there is a great deal of overlapping. Like the other Amendments, Fifth Amendment protections secured by the Self-Incrimination Clause have been made applicable to the states through the Due Process Clause of the Fourteen Amendment. *Malloy* v. *Hogan, supra.*

The scope of protection provided by the Fifth Amendment is not and probably cannot be defined



with any certainty. Courts should, however, err in favor of the invocation of the privilege. O. J. Rogge, *The First and the Fifth* (Nelson: N.Y., 1960), pp. 188-190. Although the Fifth Amendment itself appears to be couched in terms which would lead one to believe that its terms are absolute, decisions of this Court have held the contrary and have employed a balancing test, weighing the state interests or claims on the one hand against the invocation of the privilege on the other. *California* v. *Byers,* 402 U.S. 424 (1971).

Although this Court has held as a general proposition that one cannot be punished for the act of invoking a constitutional right, *See* v. *Seattle,* 387 U.S. 541 (1967); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967); *Albertson* v. *SACB,* 382 U.S. 70 (1965); *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v. *United States,* 390 U.S. 62 (1968); *Haynes* v. *United States,* 390 U.S. 85 (1968); and *Leary* v. *United States,* 395 U.S. 6 (1969), there are instances where, because of governmental needs which this Court felt, as a practical matter, were paramount, this Court has subordinated Fifth Amendment claims. *California* v. *Byers, supra; United States* v. *Sullivan,* 274 U.S. 259 (1927); and *Shapiro* v. *United States,* 335 U.S. 1 (1948).

The state has argued previously here that the state may compel the disclosure of one's name and address because that is not testimonial or communicative and is, therefore, not protected by the Fifth Amendment.

In *Schmerber* v. *California,* 384 U.S. 757 (1966); and *Warden* v. *Hayden, supra,* this Court did allow the use of blood and clothing seized from the accused, and the Court specifically left open the question whether there was some evidence which an accused could not be compelled to produce. What comes from one's lips is testimonial and communicative, *Wigmore,* to be contrasted from compelling the production of words or actions solely because they are physical characteristics. *United States* v. *Wade,* 388 U.S. 218 (1967); *United States* v. *Dionisio,* 410 US 1 (1973); *Gilbert* v. *California,* 388 U.S. 263 (1967); *United States* v. *Mara,* 410 U.S. 19 (1973); and *Cupp* v. *Murphy,* 412 U.S. 291 (1973).

A person's identity can be testimonial and communicative, and it can be incriminating at least in the sense that it can provide a link which might enable the state to obtain other incriminating evidence. *United States* v. *Scios,* 23 Cr. L. Reporter 2424 (D.C. Cir. July 21, 1978); *Gissendanner* v. *Wainwright,* 482 F.2d 1293 (5th Cir. 1973); and *United States* v. *Miller,* Nos. EP-78-CR-19, -20 (W.D. Tex., May 31, 1978), government appeal pending (No. 78-2274, 5th Cir.).

The real question, however, is whether the claims of the state here are compelling enough so that the right of silence on the part of Appellant must give way. Here again, the case of *Norwell* v. *Cincinnati, supra,* comes closest to this case. And in this case the claims of Appellant are even stronger than those in



*Norwell,* as here there was no suspicious person report and the occurrences took place in daylight. In *California* v. *Byers, supra,* this Court did review the constitutionality of the California "hit and run" statute which required drivers of vehicles involved to stop and give a report of their name and address. This Court noted that all 50 states have similar statutes.

Much as the *Sullivan* and *Shapiro,* and indeed as in *Terry* v. *Ohio,* this Court has made a practical decision that the interests of the state in "hit and run" cases are so strong that some rights would be subordinated. When one drives a vehicle, some rights will be preempted. For example, by the mere fact that one drives one may subject himself to certain license checks, vehicle inspection, searches at the border or equivalents of the border, blood tests, breathalyzer tests. Without question, this Court has recognized a strong interest in the state to regulate drivers and vehicles. *Hess* v. *Pawloski,* 274 U.S. 352 (1927); and *Kesler* v. *Dept. of Public Safety,* 369 U.S. 153 (1962). Those interests of the state are simply not present in this case, and Section 38.02(a) is not drafted in such a manner to protect those interests without penalizing protected conduct. The strong interest in government to be able to raise an army allowed the government to require registration with the Selection Service Board, and made mandatory the possession of certificates evidencing that registration. *United States* v. *O'Brien, supra;* and Section 462(b), Title 50, *United States Code.*

Section 38.02(a) applies to motorists and nonmotorists alike. In this case it was applied to a pedestrian. While the state undeniably may have the right to have cerain information about motorists, it has never been contended that a similar right exists over pedestrians. So far, to be a pedestrian, one needs no license and one is not regulated by the state. So in using the balancing test approach, what interest, other than that of curiousity, does the state intend to advance in allowing the random stop of pedestrians to demand a report of the person's name and address?

Section 38.02(a) clearly compels speech. It provides no meaningful guidance restricting its use. It advances no discernable, reasonable state interest. It provides the police with a weapon to punish protected conduct and to use the statute in a capricious and arbitrary manner.

In view of all the publicity about the *Miranda* decision, one could expect that the public might believe that one does indeed have the right to remain silent. If one has the right to remain silent after arrest, surely the invocation of that right prior to arrest should not furnish the basis for the arrest itself so that the officer can then advise the arrestee that he then has the right to remain silent. Thus, the position of the state here is that one must be arrested in order to have the right to remain silent, a thoroughly confusing and obviously illogical contention.



## Conclusion

For all of the foregoing reasons, Appellant urges this Court to reverse his conviction and to declare Section 38.02(a) of the *Texas Penal Code* void on its face.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 77-6673

* * *

ZACKARY C. BROWN,

*Appellant*

V.

THE STATE OF TEXAS,

*Appellee*

* * *

**On Appeal From The County Court At Law No. 2**
**El Paso County, Texas**

* * *

# BRIEF FOR APPELLEE

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

* * *

NO. 77-6673

* * *

ZACKARY C. BROWN,

*Appellant*

V.

THE STATE OF TEXAS,

*Appellee*

* * *

On Appeal From The County Court At Law No. 2
El Paso County, Texas

* * *

# BRIEF FOR APPELLEE

* * *

## OPINION BELOW

There is no opinion by the court below.

## JURISDICTION

The judgment of the county court at law was entered on February 1, 1978, adjudging Appellant Brown guilty of the charged offense and assessing a fine of forty five dollars plus court costs. (A. 6). The fine not exceeding one hundred dollars, the county court at law was the highest court of the state in which a decision could be had, art. 4.03, Texas Code of Criminal Procedure, and an appeal was taken directly to this Court, where jurisdiction rests upon 28 U.S.C. Section 1257(2).

## QUESTIONS PRESENTED

I. Whether Section 38.02(a) of the Texas Penal Code on its face unconstitutionally infringes upon freedom of expression protected by the First Amendment?

II. Whether Section 38.02(a) on its face is violative of the Fourteenth Amendment's Due Process Clause because it is unconstitutionally vague?

III. Whether Section 38.02(a) unconstitutionally infringes upon privacy rights protected under the Fourth Amendment?

IV. Whether Section 38.02(a) infringes upon the Fifth Amendment's privilege against compulsory self-incrimination?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 38.02 provides:

> A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information.

The First Amendment to the United States Constitution provides in part:

> Congress shall make no law . . . abridging the freedom of speech. . .

The Fourth Amendment to the United States Constitution provides in part:

> The right of the people to be secure in their persons, houses, papers, and effects, against



> unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in part:

> No person. . .shall be compelled in any criminal case to be a witness against himself. . .

The Fourteenth Amendment to the United States Constitution provides in part:

> No State shall. . .deprive any person of life, liberty, or property, without due process of law. . .

## STATEMENT

This case is on direct appeal from the final judgment of conviction entered against Appellant Brown on February 1, 1978, in County Court at Law No. 2, El Paso County, Texas.

On a bright, sunny day in early December, 1977, shortly after noon, two uniformed officers of the El Paso Police Department were patroling in a high drug problem area of El Paso. (A. 23, 26, 29). The officers, who were in a patrol car, observed Brown, whom they had never seen before (A. 24), and another man walking near one another in an unpaved alley. (A. 23). The other man was wearing an overcoat and limping. (A. 23-24). When first observed by the officers, Brown and the other man were a couple of feet apart, walking away from each other. (A. 27). The officers turned into the alley and, as they approached the two men, gained the impression that Brown and the overcoated man had

either just been together or, until the officers' approach, had intended to be together.(A. 24).

After driving up the alley to the spot where Brown was, the officers got out of the car, approached Brown, and asked him his name and his reason for being in the alley. (A. 25). Initially, they received no response--not even an explanation from Brown of why he would not give his name (A. 25), although later he did indicate that he felt they had no reason to stop him. (A. 29). The officers asked Brown his name at least once more before arresting him (A. 25) and also asked him for his residence address, but he refused to give it. (A. 32). The record does not reflect that the officers requested Brown to provide documentary identification. Brown was arrested for violation of Section 38.02(a)[1], and transported to the police station for booking. (A. 31). On the way to the station, Brown gave his name. (A. 32).

Brown was tried without a jury in Municipal Court No. 3 of the City of El Paso, Texas, found guilty, and assessed a fine of twenty dollars plus court costs. (A. 3). In accordance with Texas law, he sought and obtained a new trial in the county court at law, where he waived trial by jury and pleaded not guilty. (A. 6).

Prior to his trial on the merits, Brown presented a Motion to Set Aside Information, attacking the constitutionality of Section 38.02(a) on essentially the same grounds presented on this appeal. (A. 5). During the argument on the motion, which was denied (A. 20-21), Brown's counsel said that he assumed the officers "had some reason to make an initial stop and ask a question or so." (A. 18).

---

[1]A violation of this statute is a Class C misdemeanor, *see* Section 38.02(b), Texas Penal Code, punishable solely by a fine not to exceed two hundred dollars, *see* Section 12.23, Texas Penal Code, and imposing no legal disability beyond the fine's imposition. Section 12.03(c), Texas Penal Code.



The only evidence offered at trial was the testimony of Officer Venegas, one of the two arresting officers. Brown's counsel made no objection to this testimonial evidence on the ground that it had been obtained in violation of the Fourth Amendment to the United States Constitution, and no motion to suppress was filed.

The county court at law adjudged Brown guilty and assessed him a fine of forty five dollars plus court costs. (A. 6). This appeal followed, and, on October 16, 1978, the Court noted probable jurisdiction. (A. 40).

## SUMMARY OF ARGUMENT

Section 38.02(a) on its face implicates no First Amendment speech or expression issues. Brown's argument that mere isolated silence, without more, falls within the protections of the First Amendment is an absurd and unprecedented theory which ignores the constitutional text and the commonly understood usages of the English language. Given their most expansive reading, some cases have held that silence can be a form of protected First Amendment expression but only when the context of the silence indicates that it is an affirmation of an idea. Mere silence in the face of a law enforcement officer's lawfully asserted authority is not an expression of any idea--moral, religious, artistic, or political. Acceptance of Brown's theory of mere silence as speech would lead to unacceptable results and the consequent trivialization of the great purposes of the First Amendment. Even if First Amendment rights to expression were at stake, the state's interest in preventing crime through an intermediate level of response to street encounters would outweigh an individual's interest in expressing his silent contempt for otherwise lawful non-intrusive questioning.

Because Section 38.02(a) gives fair notice to persons of ordinary intelligence of what conduct it forbids and because its language does not encourage but discourages arbitrary and discriminatory enforcement

of the statute, it is not unconstitutionally vague. The phrase "lawfully stopped" which is attacked for imparting impermissible vagueness into Section 38.02(a) is derived from the Court's Fourth Amendment "stop and frisk" jurisprudence. In this jurisprudence, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), the Court has grappled with the complex and diverse circumstances under which law enforcement officers and citizens confront one another on the streets and has set specific guidelines for such confrontations which are designed to objectify the Fourth Amendment standards implicit in those encounters and make them reviewable in the courts. One of the premises underlying the development of the "lawful stop" concept is that a law enforcement officer's conduct in street encounters can and must be subjected to judicial control in the interest of carrying out the mandates of the Fourth Amendment. The "lawful stop" standard is a way of denying unbridled discretion to a law enforcement officer in street encounters by setting guidelines as specific as possible, given the circumstances. The Court cannot find the phrase "lawfully stopped" unconstitutionally vague without admitting the futility of its efforts in *Terry* and its progeny. Such an admission is unnecessary since Section 38.02(a) sets a standard of conduct which is reasonably ascertainable and which, this Court must assume, will be enforced by the state courts of Texas when properly called upon to do so. If a stop is not lawful, there can be no violation of Section 38.02(a), assuming the issue is raised. Furthermore, Section 38.02(a) avoids the pitfalls of the vagrancy statutes which have been held unconstitutionally indefinite, because it focuses upon a citizen's conduct, not his status as those statutes tended to do. It is a precise effort to prevent crime, rather than a blunderbuss action aimed at intimidating "undesirables." It is framed to delimit a law enforcement officer's discretion, not make it limitless.



Although Brown has attacked Section 38.02(a) as an unconstitutional infringement upon privacy rights protected under the Fourth Amendment, he is foreclosed from raising the issue here by his actions or omissions in the trial court and by the fact that the rights cannot be asserted vicariously. No objections were raised to any trial testimony as having been obtained in violation of the Fourth Amendment, and, in fact, there is an apparent concession that no Fourth Amendment violation occurred. Even if the Fourth Amendment issue can be raised now, it is meritless. Since a person has no reasonable expectation of privacy in his name which he daily exposes to public and governmental scrutiny, no "search" was conducted by the officers in asking the contested questions. Even if the questions constituted a search, it was a reasonable one since they were non-intrusive and since Brown already had been lawfully stopped. A lawful stop necessarily carries with it the understanding that at least a rudimentary field interrogation of the sort sanctioned by Section 38.02(a) will follow.

The Fifth Amendment privilege against compulsory self-incrimination is a personal privilege and cannot be asserted vicariously on behalf of others. Therefore, Brown cannot attack the statute on its face as invading that privilege. Furthermore, since the record is devoid of any indication that Brown affirmatively invoked the privilege at any point in the proceedings, this Court should not address itself to the issue of whether the privilege was invaded. Even if the privilege had been invoked personally by Brown, his name and address would not have been incriminating in any way and, therefore, the contested questions required no incriminating response from Brown implicating the Fifth Amendment. A person's name and address are neutral items of information, communicating nothing about a person's guilt. They are analogous to blood samples in that they are neither testimonial nor

communicative in nature. Brown's self-incrimination argument must fail.

## ARGUMENT

### I.

### SECTION 38.02(a) OF THE TEXAS PENAL CODE ON ITS FACE DOES NOT INFRINGE UPON THE RIGHT OF FREEDOM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

A. *Section 38.02(a) does not implicate any First Amendment freedom of expression issues.*

Brown argues that Section 38.02(a) is unconstitutional on its face because it punishes silence, which he suggests is a right protectable under the First Amendment's guarantee of freedom of speech and expression, made applicable to the states by the Due Process Clause of the Fourteenth Amendment. *See, e.g., Lovell v. City of Griffin*, 303 U.S. 444 (1938). Because Brown has not demonstrated that silence in the face of an officer's questions is an expression of any moral, religious, artistic, or political idea, his argument must fail. Section 38.02(a) does not implicate any First Amendment speech issues.

Some decisions by this Court, given an expansive interpretation, can be read to hold that silence is a form of protected expression, but only in certain contexts not present in the instant case. In *Wooley v. Maynard*, 430 U.S. 705 (1977), this Court recognized the right of a person to refuse to support an ideology arguably espoused by the State through a slogan printed on its automobile license plates. Similarly, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), this Court held that a compulsory flag salute and pledge law for children attending public schools



violated the First Amendment, because it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. at 642. In neither of these cases, however, was mere silence held to be a First Amendment right. Rather, each case recognized that the protected silence must exist in a context which indicates that it is an expression of an idea. *Cf. Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (black arm bands expressing silent protest of Viet Nam war held protected symbolic expression). The record in this case is barren of any indication that Brown's silence was an expression of any idea, and Brown has not attempted to justify his silence as a principled refusal to support some state ideology. Furthermore, no fair reading of the statute can lead to the conclusion that it could ever be used to compel support for any idea. One's name and address, in themselves, signify nothing ideological, and a refusal to report them expresses nothing worthy of First Amendment protection.

Brown has failed to cite, and the state has been unable to find, any authority upholding the principle that silence, without more, is speech. There is good reason for this failure, since Courts do not readily endorse unsupportable theories. To define mere silence as speech would not only impart an Alice-in-Wonderland quality into the English language, letting words mean what people want them to mean, but also would undermine innumerable laws enacted to protect this country's citizens from crime, unscrupulous schemes, and dangerous products. Issuers of stock could justify refusals to provide the Securities and Exchange Commission with pertinent data as protected First Amendment silence. Manufacturers of products such as drugs could support refusals to provide consumers with information on dangerous side effects or on proper use

by reference to their First Amendment right to silence. These and other results flowing from Brown's theory reveal its poverty and absurdity. Such a trivialization of the significant and fundamental rights protected by the First Amendment is wholly unacceptable and unprecedented.

Brown's reliance on *Norwell v. City of Cincinnati*, 414 U.S. 14 (1973), as the governing authority for his proposition that mere silence is speech is at best confusing and at worst wrong. In *Norwell*, this Court reversed the conviction of a man who had been stopped by a policeman while taking an evening walk, protested his being so accosted, and then been arrested and convicted for disorderly conduct. The Court found that, on the record before it, the state impermissibly had arrested and convicted the man for non-provocatively objecting to his detention. The man's speech, not his silence, was the heart of the matter. Thus, *Norwell*, the principal case on which Brown relies, presented an issue unrelated to the one presented in this case, and it can provide him no solace. No First Amendment rights are at issue here.

B. *On balance, the significant state interests furthered by Section 38.02(a) override any interests in freedom of expression it might affect.*

Even if the theory of mere isolated silence as speech were adopted, Section 38.02(a) would not be facially invalid. It is commonplace in First Amendment cases to note that the right of free speech is not absolute, *see, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942). A balance must be struck between the competing public and private interests at stake. *Barenblatt v. United States*, 360 U.S. 109, 126 (1959). *See also Konigsberg v. State Bar of California*, 366 U.S. 36 (1961). In the instant case, the balance tilts decidedly in favor of the state's interest in protecting its citizens from criminal



incursions upon their persons and property. Section 38.02(a) is an attempt by the state to allow its law enforcement officers to undertake at least a rudimentary investigation in circumstances creating a reasonable suspicion that a crime is being, has just been, or is about to be committed, but falling short of creating probable cause for an arrest. The statute eschews an all-or-nothing approach and adopts a policy favoring an intermediate response to situations raising suspicions of criminal activity. It avoids granting police a license to stop and question the state's citizens on mere whims and hunches. The sanctioned investigation potentially may either preempt the commission of a planned crime or lead to the apprehension of the perpetrator of a committed crime. In either event, the State's strong interest in preventing crime through an intermediate level of response to street encounters is evident. Balanced against this interest is the relatively insignificant interest of a lawfully stopped citizen in expressing his contempt for lawfully asserted authority through his silence in the face of that authority's non-intrusive questioning.

## II.

## SECTION 38.02(a) ON ITS FACE IS NOT UNCONSTITUTIONALLY VAGUE AND THEREFORE DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A penal statute is unconstitutionally vague and, therefore, void under either the Fifth or Fourteenth Amendment's Due Process Clause if it " 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' " *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), quoting from *United States v. Harriss*, 347 U.S. 612, 617 (1954), or if it encourages arbitrary and

discriminatory enforcement. *Papachristou v. City of Jacksonville, supra* at 162. Section 38.02(a)[2] is not unconstitutionally vague under either of these tests.[3]

A. *Section 38.02(a) gives fair notice to persons of ordinary intelligence of what conduct it forbids.*

The portion of Section 38.02 which Brown argues imparts unconstitutional vagueness into the statute is the requirement that the stop of the person by the peace officer be a lawful one.

The term "lawful stop" is not a neologism coined by the Texas legislature, unanchored to the experience and understanding of the state's citizens and capable of

[2]*Humphreys v. State*, 565 S.W.2d 59 (Tex.Crim.App. 1978), the only reported Texas state court opinion to refer to the statute, did so only in unilluminating, general terms. With no authoritative state court construction of the statute, the Court must consider the statute as it is written. *Cf. United States v. Thirty-Seven Photographs*, 402 U.S. 363, 369 (1971).

[3]Special concern and scrutiny are mandated when a statute attacked as unconstitutionally vague touches upon sensitive First Amendment freedoms. *Grayned v. City of Rockford*, 408 U.S. 104, 108-14 (1972). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67 (1960) (suggesting that the doctrine and its application may best be explained as a way to prevent deprivation *sub silentio* of citizens' rights). Since no First Amendment rights are at issue, *see* Part I, *supra*, this part of the vagueness test is not applicable in this case. For the same reason -- the absence of First Amendment issues -- Brown's attack on the statute for facial overbreadth, in which he fails to note what First Amendment right is at stake, is misplaced. Overbreadth analysis, or more appropriately, substantial overbreadth analysis, is employed in the context of First Amendment rights, *Broadrick v. Oklahoma*, 413 U.S. 601, 611-18 (1973), to ascertain the potential chilling effect on protected expression of a given statute. It has no place in the analysis of general due process problems.



being attached to any event or series of events which might catch a law enforcement officer's fancy. It is, instead, a phrase firmly rooted in a line of recent Fourth Amendment decisions, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), in which this Court has elucidated constitutional guidelines for "[s]treet encounters between citizens and police officers [which] are incredibly rich in diversity." *Terry v. Ohio, supra* at 13.[4] These decisions constitute an elaborate and painstaking effort by the Court to assure that the assertion of authority by the state over its citizens is subjected to as specific a standard as can be devised while leaving the law enforcement community with sufficient flexibility to do its job of securing the public peace. The aim of the development of the "lawful stop" concept has been to insure specificity and judicial control, abjuring vagueness instead of embracing it.

> "[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances." *Terry v. Ohio, supra* at 21 (footnotes omitted).

The importation of a constitutional norm developed to avoid vagueness and imprecision into a state penal

[4]The practice commentary following Section 38.02 also suggests these roots. *See* Vernon's Codes Annotated, Penal, §38.02, Practice Commentary.

provision, designed to give fair warning of what is prohibited, *see* Section 102(2), Texas Penal Code, cannot fairly be held to have infected that provision with unconstitutional indefiniteness. As the Court has written:

> "[The vagueness doctrine] is not a principle designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

*See also United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 578-79 (1973) (limitations in the English language...to being both specific and manageably brief...).

Brown argues, however, that, precisely because the Court itself has had disagreements during the development of the "lawful stop" concept, persons of ordinary intelligence cannot reasonably be expected to know what conduct is forbidden. *See* Brief of Appellant, p. 11. In essence, he argues that, since citizens cannot be expected to be constitutional scholars, they cannot be expected to realize when they are violating criminal provisions containing phrases rooted in constitutional law. This position must be rejected. First, it bears a strong resemblance to the proposition that ignorance of the law should be a defense to a criminal prosecution. Yet, courts and legislatures for the most part have rejected mistake of law as a defense. Weinreb, *CRIMINAL LAW, Cases, Comments, Questions* 416 (2d ed. 1975). Texas in particular has rejected such a defense except in circumstances not pertinent or not



raised here. Section 8.03, Texas Penal Code[5].

Second, the Court has twice before rejected vagueness attacks on a statute which referred to constitutional norms in defining a crime. In *Williams v. United States*, 341 U.S. 97 (1951), and *Screws v. United States*, 325 U.S. 91 (1945), a federal criminal civil rights statute, now 18 U.S.C. §242, which prohibited conduct under color of state law depriving persons of "rights, privileges, or immunities secured or protected by the constitution" was held not to be unconstitutionally vague. By the same reasoning, Section 38.02(a)'s use of the phrase "lawfully stopped," which refers to a constitutional standard, is not unconstitutionally vague. That a "willfulness" requirement was read into the statute in *Screws* does not make the cases' holdings any less binding in the instant case, since Section 38.02(a) contains the scienter requirement that a refusal to give one's name be intentional.

Part of the implicit rationale underlying these two cases' rejection of the vagueness attack is that otherwise vague terms acquire greater specificity from the historical context, including prior court decisions, from which they have developed. Other cases have used a similar approach. *See, e.g., Smith v. United States*, 431 U.S. 291, 308-09 (1977) (prior Supreme Court decisions aid in construction of obscenity statute); *Rose v. Locke*, 423 U.S. 48 (1975) ("crimes against nature" having developed meaning); *Parker v. Levy*, 417 U.S. 733 (1974) (military's general articles considered in historical

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[5]Also, for this reason, Brown's suggestion, *see* Brief of Appellant, pp. 10-11, that a layperson's misunderstanding of *Miranda v. Arizona*, 384 U.S. 436 (1966), can contribute to Section 38.02(a)'s alleged vagueness is irrelevant. *Miranda* disavowed its applicability to the situation here: "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding." 384 U.S. at 477. *See also Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

context and held not unconstitutionally vague). *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Pa.L.Rev. 67, 84 n.83 and accompanying text (1960). Through accretion deriving from numerous pronouncements by this Court and lower federal courts in cases beginning with *Terry v. Ohio, supra*, Section 38.02(a)'s phrase "lawfully stopped," which in itself is an attempt to objectify Fourth Amendment analysis of street encounters, has acquired sufficient concreteness to provide "a reasonably ascertainable standard of conduct." *United States v. Powell*, 423 U.S. 87, 92 (1975).

In *United States v. Petrillo*, 332 U.S. 1 (1947), the Court recognized that otherwise vague statutes must be upheld if they are the products of necessity, especially when the complex activities being regulated make more precise language impossible. The phrase "lawfully stopped" is a product of such necessity since it derives from an attempt to describe permissible assertions of law enforcement authority in street encounters that are, in the already quoted passage from *Terry*, "incredibly rich in diversity."

Since the phrase attacked as vague is an attempt to make more specific and objective the review of encounters otherwise subject to vague and subjective determinations, since that phrase has acquired more definite meanings during the last ten years of federal court litigation, and since that phrase is the product of necessity, Section 38.02(a) provides fair notice of forbidden conduct to ordinary citizens[6].

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[6]Because this is an attack on the facial validity of Section 38.02(a), the "as applied" analysis of cases such as *Palmer v. City of Euclid*, 402 U.S. 544 (1971), is inappropriate. In fact, since no First Amendment freedoms are at issue here, *see* Part I, *supra*, and since an "as applied" attack has been eschewed, there is some question whether the vagueness claim can be pressed at all. In *United States v. Mazurie*, 419 U.S. 544 (1975), the Court noted that, without First Amendment freedoms at stake, vagueness challenges "must be examined in the light of the facts at hand." 419 U.S. at 550. *See also United States v. Powell*, 423 U.S. 87, 92 (1975).



B. *Section 38.02(a) does not encourage arbitrary and discriminatory enforcement.*

The Court cannot accept any argument that the phrase "lawfully stopped" in Section 38.02(a) encourages arbitrary and discriminatory enforcement without rejecting as futile the attempts it has made in cases beginning with *Terry* to regulate on-the-street police conduct in accordance with the mandates of the Fourth Amendment. As discussed above, the Court has grappled with "stop and frisk" cases beginning with *Terry* in an attempt to make the police conduct at issue reviewable by a detached, neutral body. The "lawfully stopped" concept embodied in *Terry* is an attempt to discourage the arbitrary and discriminatory enforcement of criminal laws. The use of that identical concept in Section 38.02(a) has a similar objective "to guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused or convicted of offenses..." Section 1.02(5), Texas Penal Code.

That Section 38.02(a)'s use of the term "lawfully stopped" was meant to discourage arbitrary exercises of law enforcement discretion obviously does not mean that such arbitrariness will not occur. If a Texas law enforcement officer wishes to harrass a person by unlawfully stopping and questioning him on various subjects, he can do so virtually unrestricted[7], whether or not Section 38.02(a) exists. Just as the exclusionary rule does not deter unlawful police conduct not directed towards obtaining valid convictions, the "lawful stop" standard in Section 38.02(a) cannot deter questioning by police officers not directed towards conducting a proper investigation. However, Section 38.02(a) does prevent

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[7]Of course, internal administrative discipline and civil tort actions are disincentives to improper police conduct.

imposition of criminal sanctions if the stop is not proper. Under Section 38.02(a), if the law enforcement officer did not lawfully stop the person charged with the crime, there cannot be a conviction, assuming the matter is raised at trial.

Section 38.02(a) is therefore fundamentally different from the type of vagrancy ordinance that was held unconstitutionally vague in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). In *Papachristou*, the Court held that the total absence of standards governing the exercise of the discretion granted by the ordinance permitted and encouraged arbitrary and discriminatory enforcement. 405 U.S. at 170. On the other hand, Section 38.02(a)'s requirement that the stop be lawful sets a specific standard, established by the Supreme Court and reviewable by all courts, which, if not met, results in an acquittal for the criminal defendant. Thus Section 38.02(a) is unlike vagrancy statutes which tended to concentrate upon "what the man charged...*is* rather than what he does." Amsterdam, *Federal Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like*, 3 Crim.L.Bull. at 205 (1967) (emphasis in original). Section 38.02(a) concentrates upon a person's acts, not his character. The only conceivable potential for misuse of Section 38.02(a) would follow not from any vagueness inherent in its language but from the refusal or failure of state courts to apply properly the Fourth Amendment requirements for lawful stops to the cases before it. Such a limited and remote potential provides no basis for finding Section 38.02(a) constitutionally infirm. This Court does not premise its constitutional law decisions on assumptions that state courts will not abide by the mandates of the United States Constitution. *Cf. Stone v. Powell*, 428 U.S. 465 (1976).



## III.

## SECTION 38.02(a) DOES NOT INFRINGE UNCONSTITUTIONALLY UPON ANY PRIVACY RIGHTS PROTECTED UNDER THE FOURTH AMENDMENT.

### A. *Brown is foreclosed from raising the Fourth Amendment issue in this Court.*

During argument on his motion to set aside the information in which his client was charged with a Section 38.02(a) misdemeanor violation, Brown's attorney stated that he assumed the officers had some reason other than merely ascertaining his name for stopping and questioning Brown. (A. 18). While the statement may not clearly constitute an admission of the stop's lawfulness, it is suggestive of one and might have led the presiding judge to think that the stop's lawfulness was conceded, especially when taken in conjunction with the following factor. Additionally, and more importantly, Brown's attorney failed to move to suppress or object to any of the evidence presented against his client on grounds that it had been obtained in violation of the Fourth Amendment, which, under *Mapp v. Ohio*, 367 U.S. 643 (1961), is applicable to the states through the Due Process Clause of the Fourteenth Amendment.

Under settled Texas law, failure to object to the introduction of evidence obtained in an allegedly illegal search or seizure bars appellate review of the admissibility of the evidence. *See, e.g., Branch v. State*, 477 S.W.2d 893, 895 (Tex.Crim.App. 1972). This contemporaneous objection rule, which clearly would have been invoked by Texas' criminal appellate court had it been presented with the case, constitutes an adequate state procedural ground barring Supreme Court consideration of the issue on direct review if the

state rule serves a legitimate state interest. *Henry v. Mississippi*, 379 U.S. 443 (1965). In *Henry*, this Court recognized the legitimacy of the state interest in such a rule because it gives the trial judge an opportunity to conduct the trial without using the tainted evidence and increases the likelihood that new trials can be avoided, thereby contributing to the efficient use of judicial resources. 379 U.S. at 448. In *Henry*, however, on the record before it, the Court found that this purpose of the rule may have been served substantially by the defendant's motion for a directed verdict "*because of the erroneous admission of* [*an*] *officer's testimony.*" *Id.* (emphasis added). The motion for a directed verdict, which tends to be rather *pro forma* in criminal litigation, was sufficiently specific in that instance to perform essentially the same function as the contemporaneous objection rule. The analogous motion in the instant case was only a general one based on the insufficiency of the evidence. When taken in conjunction with the concession in the argument on Brown's motion, it could not have apprised the trial judge of what evidence was allegedly tainted (A. 32). Thus, the alternative method recognized in *Henry* of furthering the state's interest in its contemporaneous objection rule was not present. Therefore, Brown's failure to object to the admissibility of the officer's testimony on grounds that it was derived from an illegal search or seizure forecloses consideration of any Fourth Amendment claims on this appeal, including his privacy claims[8].

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[8]Brown may not press his Fourth Amendment claim before this Court for another reason. Both in the trial court and in this Court, Brown couched his Fourth Amendment privacy attack against the statute *on its face* in general terms, without attaching decisive importance to the facts of his case. Fourth Amendment rights being personal rights which cannot be asserted vicariously, *Alderman v. United States*, 394 U.S. 165 (1969), Brown's attempt to vicariously assert them on behalf of society at large must fail. *See generally Rakas v. Illinois*, ___U.S.___, 47 U.S.L.W. 4025, 5026-29, (U.S. Dec. 5, 1978).



B. *The officers' "search" of Brown by asking him his name and address after lawfully stopping him was reasonable.*

Insofar as the officers' asking Brown his name and address after lawfully stopping him can be termed a search within the meaning of the Fourth Amendment[9], it was a reasonable search which did not violate the strictures of the amendment, which only prohibits searches that are unreasonable. *Elkins v. United States*, 364 U.S. 206 (1960).

A prerequisite to the requirement that a person reply to an officer's queries about his name and address is that that person have been "lawfully stopped" by the officer. The officer must have had a reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed, with the stopped person implicated in the process. *See generally Terry v. Ohio*, 392 U.S. 1 (1968); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977).

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[9]It is doubtful that a person who has been "lawfully stopped", *see, e.g., Terry v. Ohio*, 392 U.S. 1 (1968), harbors a "reasonable expectation of privacy," *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), in his name and address, which are facts constantly subject to governmental discovery by reference to information sources such as federal income tax withholding and reporting forms, drivers' license files, and property tax rolls. Like the physical characteristics of a person's voice, *United States v. Dionisio*, 410 U.S. 1 (1973), and his handwriting, *United States v. Mara*, 410 U.S. 19 (1973), a person's name and address are so constantly exposed to the public that no reasonable expectation of privacy remains, particularly for a person already lawfully stopped. Without this reasonable expectation of privacy, there is no search implicating the Fourth Amendment and, consequently, no need to demonstrate the reasonableness of the intrusion.

With the lawful stop as a prelude, the additional intrusions, if such they be, condoned by Section 38.02(a) are miniscule and, under the circumstances, eminently reasonable. *Cf. Pennsylvania v. Mimms, supra* (additional, incremental intrusion of asking person to get out of car after a lawful stop was *de minimis*). The inquiries are "reasonably related in scope to the justification for their initiation." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975), quoting from *Terry v. Ohio, supra*. The statute is intended to provide the police a reasonably sharply defined but non-Draconian way either to preempt the commission of a crime against persons or property or to apprehend the perpetrators of a recently committed crime if circumstances developing after the stop warrant it. When this Court sanctioned stops on less than probable cause in *Terry v. Ohio, supra*, it recognized the necessity and reasonableness of graduated levels of response by law enforcement authorities to situations suggesting that crimes might be afoot. Limited field interrogation of the type at issue here is a concomitant of the sanctioned stop, implicitly recognized in *Terry, see* 392 U.S. at 11-12. Later, in *Adams v. Williams*, 407 U.S. 143 (1972), this Court again addressed the problems arising from street encounters between citizens and law enforcement officers in situations where probable cause for arrest is absent. In *Adams*, the Court apparently recognized that, at the least, field interrogation concerning identity is a vital and integral part of a lawful stop:

> "A brief stop of a suspicious individual, *in order to determine his identity...*, may be most reasonable in light of the facts known to the officer at the time." *Adams v. Williams*, 407 U.S. at 146 (emphasis added).

*See also United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975). Thus, this Court already has recognized



that questions as to identity which Brown challenges as invasions of his privacy protected by the Fourth Amendment are reasonable concomitants of lawful stops, and, therefore, the type of rudimentary field interrogation that is permissible under the Fourth Amendment.

Following *Adams v. Williams, supra*, lower court decisions on issues concerning the reasonableness of searches or seizures following a lawful stop suggest, often implicitly through their cursory treatment of the identity issue, how comfortably the questions sanctioned by Section 38.02 fit within the boundaries of the Fourth Amendment reasonableness requirement. For example, in *United States v. Wylie*, 569 F.2d 62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978), the court found the compelled reentry of a suspect into a bank for a brief inquiry was part of a lawful investigative stop sanctioned by *Terry* and *Adams*. In *United States v. Purry*, 545 F.2d 217 (D.C. Cir. 1976), the same circuit found proper under *Terry* and *Adams* a law enforcement officer's determining a suspect's identity, questioning the suspect, and even temporarily handcuffing the individual. In an opinion by Judge Friendly, the Second Circuit has found that an Immigration and Naturalization Service investigator's interrogation of stopped individuals to determine their identity and alienage fit within *Terry* and *Adams*. *United States v. Rodriquez*, 532 F.2d 834 (2d Cir. 1976). *See also United States v. Magda*, 547 F.2d 756 (2d Cir. 1976), *cert. denied*, 434 U.S. 878 (1977) (questioning of stopped individuals about what they had been doing was only a minor, lawful intrusion). In *United States v. Collins*, 532 F.2d 79 (8th Cir.), *cert. denied*, 429 U.S. 836 (1976), and *Dell v. Louisiana*, 468 F.2d 324 (5th Cir. 1972), *cert. denied*, 411 U.S. 938 (1973), the courts upheld as reasonable law enforcement officers' requests for identification, such as a driver's license, from the drivers of lawfully stopped cars. Of course, none of these

decisions binds this Court, but taken together, they indicate that the request for identification in the context of a lawful stop ranks very low on the scale of potential intrusiveness. These cases, as well as a common sense understanding of the realities of lawful investigative stops, further indicate that a recognition of the legitimacy of stops on less than probable cause carries with it the approval of at least a rudimentary field interrogation of the type at issue in this case. *See* LaFave, *"Street Encounters" and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 Mich.L.Rev. 40, 95 (1968) (*Terry* would make no sense if stops are permissible only to make identification). The questions authorized by Section 38.02(a) being reasonable in the context in which they occur, no Fourth Amendment privacy rights are denied[10].

## IV.

## SECTION 38.02(a) DOES NOT INFRINGE UPON BROWN'S PRIVILEGE AGAINST COMPULSORY SELF-INCRIMINATION PROTECTED BY THE FIFTH AMENDMENT.

The Fifth Amendment's privilege against compulsory self-incrimination, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Malloy v. Hogan*, 378 U.S. 1 (1964), is purely a personal privilege, not assertable on

[10]Brown appears to disavow any reliance on a general due process right of privacy emanating in part from the Fourth Amendment, see Brief of Appellant, p. 20, but, insofar as the issue is raised, it is wholly without merit. If the publication and distribution of one's identity, including name and photograph, as a potential shoplifter following an arrest and dismissal of charges does not constitute an invasion of one's privacy, *Paul v. Davis*, 424 U.S. 693, 712-13 (1976), the mere disclosure of one's name and address to a law enforcement officer, without publication and distribution, certainly does not. *See also Whalen v. Roe*, 429 U.S. 589 (1977); *Nixon v. Administrator of General Services*, 433 U.S. 425, 455-65 (1977).



behalf of others. *United States v. Nobles*, 422 U.S. 225 (1975); *Rogers v. United States*, 340 U.S. 367 (1951). It must be affirmatively invoked before it may be claimed, *id.*, and, though the utterance of no talismanic phrase is necessary, its invocation must be such that the interrogator reasonably may be expected to be aware that the privilege is being claimed. *Emspak v. United States*, 349 U.S. 190 (1955).

In the instant case, Brown has failed to bring his refusal to answer the officers' questions about his name and address within the Fifth Amendment privilege because he has attempted, through attacking Section 38.02(a) on its face, to invoke the privilege not on behalf of himself, but vicariously on behalf of all who conceivably may be affected by the statute, and he has failed to point to any part of the record which indicates that he affirmatively invoked the privilege in such a way that the officers could have been aware that the privilege was being invoked.

Even if the privilege had been invoked personally by Brown, the record is devoid of any indication that his name and address would have been incriminating in any way. The privilege does not protect merely private information, but only that information which would be incriminating. *United State v. Nobles*, 422 U.S. 225, 233 n.7 (1975). In this regard, this Court has written:

> "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

On the record before this Court, nothing in the

implications or the setting of the questions about Brown's name and address suggests that answers would have proven injurious to him. Simply put, the statute required no incriminating response from Brown.

In *California v. Byers*, 402 U.S. 424 (1971), this Court held that a requirement that a driver of a motor vehicle involved in an accident stop at the scene and give his name and address to law enforcement officers does not violate the privilege against compulsory self-incrimination. In his plurality opinion joined by three other Justices, Chief Justice Burger wrote:

> "In order to invoke the privilege it is necessary to show that the compelled disclosures will themselves confront the claimant with 'substantial hazards of self-incrimination.'" *California v. Byers*, 402 U.S. at 429 (plurality opinion of Burger, C. J.)

The opinion went on to note that there is nothing inherently incriminating about a person's name and address. 402 U.S. at 432.

These observations are pertinent to the instant case. Even had Brown personally invoked the privilege when he failed to give his name and address in response to the officers' questions, the privilege would not have been applicable. A person's name and address are neutral items of information which communicate nothing about the person's guilt.[11] In this sense, then, a person's name and address are analogous to blood samples in that they are neither testimonial nor communicative in nature, and, therefore, do not implicate the privilege. *See Schmerber v. California*, 384 U.S. 757 (1966). *See also Gilbert v. California*, 388 U.S. 263 (1967) (handwriting

[11]Though not present here, a situation conceivably might exist in which a person's true name, without more, might tend to suggest criminal culpability. The crime of forgery might be one example.



exemplars); *United States v. Wade*, 388 U.S. 218 (1967) (voice exemplars and exhibition of accused at post-indictment lineup); *Holt v. United States*, 218 U.S. 245 (1910) (modeling of blouse by accused). In fact, one's name and address in themselves communicate much less information regarding one's identity which might link one to criminal activity than these other types of information which have been held non-communicative and non-testimonial despite their utility in tying persons with certain characteristics to criminal events. A name and address signify nothing relating to criminality, and it is for this reason that Chief Justice Burger wrote that a name "identifies but does not by itself implicate anyone in criminal conduct." *California v. Byers*, 402 U.S. at 434. *See also* Abrams, *Constitutional Limitations on Detention for Investigation*, 52 IowaL.Rev. 1093, 1117 (1967). Brown's self-incrimination argument therefore must fail for any one or all the reasons set forth above.

## CONCLUSION

Section 38.02(a) of the Texas Penal Code is constitutional, and, the lawfulness of Brown's stop being either unchallenged by Brown or unreviewable by this Court under the circumstances of this case, the judgment of conviction should be affirmed.

Respectfully submitted,

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January, 1979

FEB 12 1979

MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

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No. 77-6673

ZACKARY C. BROWN,

Appellant,

v.

STATE OF TEXAS

---

Appeal from the County Court at Law Number Two
El Paso County, Texas

---

# APPELLANT'S REPLY BRIEF

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IN THE SUPREME COURT OF THE UNITED STATES

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Appeal from the County Court at Law Number Two
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APPELLANT'S REPLY BRIEF

Appellant Zachary Brown submits the following brief in reply to Appellee's brief:

I.
First Amendment Questions

A. The State argues that "Section 38.02(a) does not implicate any First Amendment freedom of expression issues."

Contrary to the position of the State here, refusal to reveal one's identity can be protected activity under the First Amendment. For example, there could be a meeting of a controversial or unpopular or oppressed group, or it could be a civil rights organization, a group of masked Iranian marchers, a gay rights organization, or an anti-war protest. Suppose that the authorities want to find out the membership of the organizations and the identities of participants at meetings, marches, rallies, and other assemblies. Since they cannot by court action or statute compel the disclosure of membership lists, N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958), may the State accomplish the same end simply by stopping each marcher or member and forcing that person to reveal his or her identity? The answer should be that the State may not. In N.A.A.C.P. v. Alabama, supra, this Court stated:

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.

357 U.S. at 462.

So privacy of association has long been recognized as protected by the First Amendment. The right of privacy of association would be meaningless if one can be forced to reveal his identity. What would stop the police from entering an assembly and forcing each and every participant to reveal his or her identity?

It could be that a group does not want its membership known, and it could also be that an individual does not want his interest or affiliation with a group to be known. The examples are too numerous to cite, but they could include the worker who is interested in union membership but does not want his employers to know. Close affiliation by law enforcement with some companies, particularly in some small communities, is not uncommon. It could be the reverse; the case of the worker who wishes to decertify a union as a bargaining agent or to change to another union. It could be the case of the Iranian student who wears a mask to hide his identity because of fear of reprisal if it becomes known that he is protesting against a particular government. Recently, a

California statute making criminal the wearing of masks in public was held void and unconstitutional. Ghafir v. Municipal Court for City and County of San Francisco, 150 Cal.Reptr. 813 (Cal.Ct.App., 3rd Div. 1978). Or it could be the case of a person who protests, alone or with others, the violation of human rights in Communist countries but does not want his or her identity known because of possible reprisals against friends or relatives in the old country.

So silence is part of one's right to freedom of expression and association under certain circumstances.

B. The State contends that "on balance, the significant state interests furthered by Section 38.02(a) override any interests in freedom of expression it might affect."

In this part of the argument the State listed one, and only one, interest and expressed it as follows:

> In the instant case, the balance tilts decidedly in favor of the state's interest in protecting its citizens from criminal incursions upon their persons and property. Section 38.02(a) is an attempt by the state to allow its law enforcement officers to undertake at least a rudimentary investigation in circumstances creating a reasonable suspicion that a crime is being, has just been, or is about to be committed, but falling short of creating probable cause for an arrest.

(Appellee's brief, p. 11)

The State has apparently missed the entire point of a section of Appellant's brief. One of the problems with Section 38.02(a) is that it is not restricted to instances of criminal conduct or even suspected criminal conduct. Appellant previously pointed out that Article 2.24 of the Texas Code of Criminal Procedure, repealed and replaced by Section 38.02(a), did require identification by witnesses to crimes. The State did not even mention old Article 2.24, or the fact



that Section 38.02(a) is applicable whether or not a crime is committed or even suspicioned.

If the only interest asserted by a state is one to prevent crime, then there is no state interest sufficient to overcome one's right to remain silent and refuse to identify oneself. The conduct which Appellant asserts is protected by the First Amendment does not involve criminal acts, but merely the types of activities long sanctioned by this Court, such as speaking, marching, or attending private meetings, or attending public meetings anonymously.

Not only has the State not demonstrated a compelling interest as is required when First Amendment rights are to be subordinated, Sweezy v. New Hampshire, 354 U.S. 234 (1957); and N.A.A.C.P. v. Alabama, supra, it has not shown an applicable interest at all.

## II.
## Fourteenth Amendment Questions

A. Section 38.02(a) is vague on its face and does not meet due process certainty in drafting requirements.

In cases involving First Amendment protected rights, this Court's standards for vagueness are more strict than in other cases. N.A.A.C.P. v. Button, 371 U.S. 415 (1963). It has previously been shown that the language used by Section 38.02(a) is not subject to precise construction. Some law officers have construed the "identification" requirement to include something beyond an oral identification and might include specified types of identification. Heath, Thomas and Washington v. A. J. Brown, et al., CA-4-77-204 (N.D. Tex.), jurisdictional statement pending; and Michigan v. DeFillippo, No. 77-1680 (U. S. Supreme Court).

B. Section 38.02(a) is unconstitutionally overbroad because it makes criminal conduct protected by the Constitution.

More than being void for vagueness, this statute is unconstitutional because it is impermissibly broad and allows the State to punish one for conduct protected by the Constitution. It is not necessary that Appellant have engaged in protected conduct himself in order to benefit from this argument. This Court has stated as follows in N.A.A.C.P. v. Button, supra:

> [A statute] may be invalid if it prohibits privileged exercises of First Amendment rights whether or not the record discloses that the petitioner has engaged in privileged conduct. For in appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute in other factual contexts besides that at bar. . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. . . . These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. . . . Because First Amendment rights need breathing space to survive, government may regulate in the area only with narrow specificity.

371 U.S. at 432, 433.

For those reasons stated before and below, Section 38.02(a) does make criminal protected activity and is, therefore, unconstitutional.

## III.
## Fourth Amendment Questions

A. The state contends that Appellant "is foreclosed from raising the Fourth Amendment issue in this Court."

The State argues that Fourth Amendment violations may be raised only by filing a motion to suppress evidence. There



was no tangible evidence to present here. The only evidence was negative--that is, that Appellant did not identify himself.

Appellant attacked Section 38.02(a) on its face and not as it was applied in this specific case. Having done that, certainly Appellant is in a position to argue that the statute is vague and overbroad because it punishes conduct or activity which is protected by the Fourth as well as other amendments. The State cites this Court cases on standing, claiming that Appellant has no standing to complain of Fourth Amendment violations on others. The State totally misses the point here.

In an examination of a statute for vagueness and overbreadth, one must look to see if conduct protected by the Constitution is punished. Certainly, since Appellant has attacked the statute on its face, he can point to its actual as well as its potential application.

B. Section 38.02(a) is unconstitutional as making lawful unwarranted invasions of rights protected by the Fourth Amendment.

Here again, the State speaks of the "search" in this case being reasonable. There was no search in this case, and Appellant goes beyond the facts of this case to attack the statute on its face.

Although no appellate court has previously reviewed Section 38.02(a), the Texas Court of Criminal Appeals, sitting en banc, has recently spoken on those same issues involved in this case. In Ceniceros v. State, 551 S.W.2d 50 (Tex.Ct.Crim. App. 1977), that Court stated as follows:

> I can see how some would view the request for identification as a relatively minor intrusion into the personal freedom of an individual. However, I cannot accept the reasoning that the individual can remedy an unjustified request by simply denying the request and walking away. See, Nicholas,

supra, at 624. To so hold would be to belie the fact that most ordinary citizens feel they must act with respect for the color of the law. Unjustified requests for individuals to produce their identification should not take place.

Because there was no shred of justification for the arresting officer's demand that the appellant produce his identification, I would hold that this action was unreasonable within the meaning of the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Constitution of this State. [Panel dissenting opinion which was adopted by the majority en banc.]

* * *

> The officer here, acting under his badge of authority, approached the appellant and his companions specifically for investigative purposes to secure information and 'to see if they had any business in the area.' Such investigations should be initiated only if the officer can give 'specific reasonable inferences which he is entitled to draw from the facts in light of his experience,' Terry v. Ohio. . . . It appears the officer initiated his investigation on 'his inchoate and unparticularized suspicion' (Terry v. Ohio, supra) that appellant and his companions might in some way be connected with the recent burglaries. If such a suspicion were a reasonable inference from standing on a street corner in this neighborhood, all citizens passing through victimized neighborhoods would be suspects, and pedestrian checkpoints could be set up to monitor their comings and goings. Practices of this kind are repugnant to a free society. If victimization by crime becomes the justification for indiscriminate intrusion by the state, then we forfeit the security of our persons and privacy from invasion by the police on a hope of future security from the criminal, and ultimately find ourselves the displaced refugees in a raging war on crime.

So, at least in Texas, asking for a person's identity when there is no particular need to do so does violate the Fourth Amendment, contrary to what Appellee contends.

Because one may reveal his or her name on some occasions does not mean that a policeman has the right to force a person to reveal his or her name under any circumstances. The right of privacy already discussed and the right to keep one's



associations private and confidential should be paramount and should remain intact.

## Conclusion

For all the foregoing reasons, as well as for those previously set out in the opening brief, Appellant urges this Court to reverse his conviction and declare Section 38.02(a) of the Texas Penal Code unconstitutional.

Respectfully submitted,

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By: RAYMOND C. CABALLERO

## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 1979, true copies of Appellant's Reply Brief were mailed to: Renea Hicks, Assistant Attorney General, P. O. Box 12548, Austin, Texas, 78711; and Karl Phaler, Deputy Attorney General, 110 West A Street, Suite 600, San Diego, California, 92101.

RAYMOND C. CABALLERO

Supreme Court, U. S.
FILED
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IN THE

# Supreme Court of the United States

October Term 1978

**No. 77-6673**

ZACKARY C. BROWN,

*Appellant,*

*v.*

THE STATE OF TEXAS,

*Appellee.*

Appeal From the County Court of Law,
No. 2, El Paso County, Texas

## BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1978

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No. 77-6673

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ZACKARY C. BROWN, Appellant,

v.

THE STATE OF TEXAS, Appellee.

---

# BRIEF OF AMICUS CURIAE STATE OF CALIFORNIA IN SUPPORT OF APPELLEE

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## INTEREST OF AMICUS CURIAE

The Attorney General of California is the chief law officer of the state, whose duty it is to see that the laws of the state of California are uniformly and adequately enforced. (Cal. Const., art. V, § 13.)

Among these statutes is California Penal Code section 647(e), which defines as a misdemeanor the conduct of a person "[w]ho loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer so to do, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification."

The legal and constitutional significance of this California statute is substantially similar to that of the Texas Penal Code section under consideration in this case. The people of California thus have a vital interest in this Court's resolution of the constitutionality of Texas Penal Code section 38.02(a).

## SUMMARY OF ARGUMENT

The due process challenges to the Texas statute and related enactments involve important questions of public policy. Insofar as these statutes are further challenged as violative of the Fourth Amendment, a further question of public policy is presented. In determining whether the intrusion authorized by the Texas statute is "reasonable", the degree of the intrusion must be balanced against the public good sought to be served. A brief examination of other cases demonstrates the intrusion in cases such as these is less substantial than those sanctioned in other areas, responsive to identical public concerns.

## ARGUMENT

### A REQUIREMENT OF IDENTIFICATION DURING THE COURSE OF A LAWFUL DETENTION IS REASONABLE

More than ten years ago this Court confronted a question raising "difficult and troublesome issues regarding a sensitive area of police activity . . .". (Terry v. Ohio (1968) 392 U.S. 1, 9.) That case, as this one, dealt with the necessarily swift actions, predicated upon his on-scene observations, of an officer on the beat. This Court recognized the necessity for evaluating



such actions against the Fourth Amendment's "general proscription against unreasonable searches and seizures." (Id. at p. 20.)

In Terry, of course, this Court affirmed the right of a police officer to conduct a reasonable search for weapons for his own protection when he had reason to believe he was dealing with an armed and dangerous individual, without regard to whether the officer had probable cause to arrest the individual for a crime. This conduct was determined to be reasonable within the meaning of the Fourth Amendment notwithstanding the fact such a protective search for weapons "constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." (Id. at p. 26.)

More recently, this Court has applied the principles set forth in Terry to the case of a police officer who had received information from an informant that a certain individual at a given location was carrying narcotics and a concealed weapon. (Adams v. Williams (1972) 407 U.S. 143, 144-145.) In affirming the right of the officer to search in those circumstances, this Court observed that the Fourth Amendment "does not require a policeman who lacks the precise level of information necessary for probable bable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." (Id. at p. 145.) Further, in dealing with the question of reasonableness the court observed that "[a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." (Id. at p. 146.)

The act of the police officer in each of the above cases was constitutionally permissible despite the court's clear understanding that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." (Terry v. Ohio, supra, 392 U.S. at pp. 24-25.)

The intrusion in the present case, a requirement of identification upon request following a lawful detention, is far less severe. When border patrol officers reasonably suspect a particular vehicle may contain aliens illegally in the country, they may stop a vehicle and "question the driver and passengers about their citizenship and immigration status, and . . . ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." (United States v. Brignoni-Ponce (1975) 422 U.S. 873, 881-882.) This Court characterized such an intrusion as "modest", and observed that "[b]ecause of the limited nature of the intrusion, stops of this sort may be justified on facts that do not amount to the probable cause required for an arrest." (Id. at p. 880.) In its analysis of the question, the court relied heavily upon Terry, supra, and Adams, supra. (422 U.S. at pp. 880-884.) An independent suspicion was first necessary for a stop and questioning, however, as the Fourth Amendment forbids "stopping vehicles at random" and making alien inquiries and also, of course, "forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens." (Id. at p. 884.)



Finally, in United States v. Martinez-Fuerte (1976) 428 U.S. 543, this Court determined that a brief detention of vehicles and occupants at routine checkpoints was permissible in light of the government interest sought to be served. (Id. at p. 562.) Such initial questioning in a stop, and further questioning following a secondary referral, were held to constitute an intrusion "sufficiently minimal that no particularized reason need exist to justify it . . .". (Id. at p. 563.)

This case involves, as did Terry, a sensitive area of police activity which has "never before been squarely presented to this Court." (Terry v. Ohio, supra, 392 U.S. at pp. 9-10.) It is clear the intrusion authorized by the Texas statute and related statutes is far less severe than the pat-down search authorized in that case. Amicus does not suggest, however, police officers should be empowered to conduct random demands for identification of citizens they encounter. Such a position would be inconsistent with the Fourth Amendment's clear intent "to prevent wholesale intrusions upon the personal security of our citizenry . . .". (Davis v. Mississippi (1969) 394 U.S. 721, 726.) Wholesale requirements of identification without reasonable suspicion were explicitly condemned in United States v. Brignoni-Ponce, supra, 422 U.S. at p. 884.

Instead, the Texas statute, like the California statute and related ordinances in other states, requires a lawful detention before a demand for identification may be initiated. The application of such a requirement is thus necessarily the converse of random. The identification requirement is particularized, and referrable in each

instance to objective factors supporting a forcible detention. There is thus no reason to fear the "dragnet" approach condemned in Davis v. Mississippi, supra.

Perhaps the closest analogy to the present question was presented in the recent case of Pennsylvania v. Mimms (1977) 434 U.S. 106. The question there presented for decision was the lawfulness of a police officer's ordering a driver out of an automobile following a lawful stop for a traffic violation. (Id. at pp. 107-108.) The court there again observed the test under the Fourth Amendment is the reasonableness of the particular governmental invasion, all circumstances considered, and the determination of reasonableness itself is dependent on a balance between the public interest and the individual's right to freedom from arbitrary interference. (Id. at pp. 108-109.)

Weighing the police officer's interest in his own safety against the minimal further intrusion of being ordered out of the automobile, this Court determined such a practice did not violate the Fourth Amendment. (Id. at p. 111.) In cases arising under the Texas statute, the similar California statute, or the Michigan ordinance at issue in a companion case to this one[1] there must exist,

---

1. Michigan v. DeFillippo, 77-1680. The primary challenge to the Michigan ordinance is on due process grounds, which matters are covered in the Brief of Amicus Curiae State of California in Support of Petitioner in that case.



before a requirement of identification, adequate grounds for a forcible detention, precisely analogous to the detention for a traffic violation in Mimms, supra. Given the "seizure" inherent in a lawful detention, surely an identification requirement is no greater a further intrusion than a request to one stopped for a traffic violation to alight from his vehicle. In each type of case the underlying factors supporting the detention provide the particularized focus ensuring against random application of the minimal further intrusion occasioned, in these cases, by the requirement of identification.

It is clear an identification requirement, serving important governmental interests, is proper in cases where there is a reasonable suspicion, less than probable cause, of illegal activity. Because the identification requirement will necessarily come into play in a particularized fashion, following the existence of factors supporting a forcible detention, and itself is a far more modest intrusion than a "severe, though brief" search, it is consistent with the Fourth Amendment's requirement such intrusions be reasonable.

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